86 1378

Supreme Court, U.S.
FILED
FEB 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5750

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HANIL BANK,
Petitioner,
vs.
CARLYLE MICHELMAN, TRUSTEE
Respondent.

PETITION OF HANIL BANK FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LILLICK MCHOSE & CHARLES
M. DAVID MINNICK
725 South Figueroa Street
Suite 1200
Los Angeles, CA 90017
(213) 488-7100
Counsel for the Petitioner
Hanil Bank

Bowne of Los Angeles, Inc., Law Printers (213) BOWNE CO

74pp

QUESTIONS PRESENTED

In contrast to the refusal of the Fifth Circuit and the Eleventh Circuit to allow the use of Fed. R. Civ. P. 60(a) to affect substantial rights of the parties, the Ninth Circuit allowed a trial court to use Rule 60(a) to change a judgment of dismissal with prejudice to a judgment of dismissal without prejudice, almost two years after its entry and without regard for the prejudice resulting from the change. The questions presented are:

1. Whether a court can use Fed. R. Civ. P. 60(a) to avoid the balancing of interests required by Fed. R. Civ. P. 60(b) and make a substantial change in a judgment at any time;

2. Whether a court can use Rule 60(a) to negate the effect of Fed. R. Civ. P. 41(hb) two years after Rule 41(hb) made a judgment with prejudice; and

3. Whether an appellate court can use the clearly erroneous standard to uphold the use of Rule 60(a) to implement a trial court's statement of its alleged original intent without requiring clear and convincing evidence of the intent in the record.

LIST OF PARTIES

The petitioner Hanil Bank was formerly known as The Hanil Bank Limited. In addition to the parties identified in the caption of the case, Korea Exchange Bank filed an amended complaint and named as defendants Harvard M. Jee, The Bank of Beverly Hills, Leon Pizante, Eun S. Jee, Eugene T. Carlson, Berry D. Locke, and Sang J. Kim as well as the Hanil Bank and Carlyle Michelman. Carlyle Michelman's cross-complaint named as defendants Harvard M. Jee, Eugene T. Carlson, Eun S. Jee, Berry D. Locke, and Sang J. Kim in addition to the Hanil Bank. Korea Exchange Bank dismissed its complaint and none of the remaining parties other than Hanil Bank and Carlyle Michelman participated in the proceedings below.*

---

*Petitioner Hanil Bank owns a majority interest in The First Bank Southern California, a California banking corporation. Rule 28.1, Rules of the Supreme Court of the United States.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Opinions	1
Jurisdiction	1
Statutes and Rules Involved	2
Statement of the Case	2
Reasons For Granting The Petition	8
Conclusion	21

INDEX TO APPENDICES

Appendix A.	Rehearing Denied	A-1
Appendix B.	Opinion of the Court of Appeals	B-1
Appendix C.	Judgment of Reversal	C-1
Appendix D.	Order Vacating Order Entered January 23, 1984, Granting Motions to Reopen Hearing, Granting Motion for Order Clarifying and Specifying That Dismissal of Cross-Complaint Was Without Prejudice, and Clarifying That Judgment of Dismissal of Cross-Claim Was Without Prejudice	D-1
Appendix E.	Judgment of Dismissal	E-1
Appendix F.	Reporter's Transcript of Proceedings	F-1
Appendix G.	Rules of Civil Procedure	G-1
Appendix H.	Rules of Bankruptcy Procedure	H-1

TABLE OF AUTHORITIES

Cases

	Page
Ackermann v. United States, 340 U.S. 196 (1950)	13, 18
American Trucking Association v. Frisco Transportation Company, 358 U.S. 133 (1958)	19
Ashford v. Stuart, 657 F.2d 1053 (9th Cir. 1981)	13
Beliz v. W. H. McLeod & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985)	10
Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, reh. den., 434 U.S. 1089 (1978)	12
Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978)	17
Chicago North Western Railway Co. v. Union Pack. Co., 527 F.2d 592 (8th Cir. 1976)	14
Costello v. United States, 365 U.S. 265 (1961)	17, 18
Galiardi, In re., 745 F.2d 335 (5th Cir. 1984)	10, 19
Glick v. White Motor Co., 317 F.Supp. 42 (E.D. Pa. 1970) aff'd 458 F.2d 1287 (3rd Cir. 1972)	14
Gray v. Dukedom, 216 F.2d 108 (6th Cir. 1954)	14
Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979), cert. den., 458 U.S. 1106 (1982)	17
Jones v. Anderson-Tully Co., 722 F.2d 211 (5th Cir. 1984)	14
Kern v. Hettinger, 303 F.2d 333 (2nd Cir. 1962)	17
Lee v. Joseph E. Seagram & Sons, Inc., 592 F.2d 39 (2nd Cir. 1979)	13, 14
Liberty Mutual Ins. Co. v. E.E.O.C., 691 F.2d 438 (9th Cir. 1982)	18

Table of Authorities

Cases

	Page
Mullins v. Nickel Plate Mining Co., Inc., 691 F.2d 971 (11th Cir. 1982)	10
Sack v. Low, 478 F.2d 360 (2nd Cir. 1973)	12
Safeway Stores v. Fannan, 308 F.2d 94 (9th Cir. 1962)	11
Scola v. Boat Frances R., Inc., 618 F.2d 147 (1st Cir. 1980)	11
Weissinger v. United States, 423 F.2d 795 (5th Cir. 1970)	17

Miscellaneous

Advisory Committee Notes to Fed. R. Civ. P. 59 12

Rules

Federal Rules of Civil Procedure, Rule 1 17

Federal Rules of Civil Procedure, Rule 6(d) 12

Federal Rules of Civil Procedure, Rule 41(b) ..... i, 2, 7, 8, 9, 17, 18, 21

Federal Rules of Civil Procedure, Rule 59(e) 2, 11, 12, 13, 14, 15, 20

Federal Rules of Civil Procedure, Rule 60(a) ..... i, 2, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21

Federal Rules of Civil Procedure, Rule 60(b) ..... i, 6, 7, 9, 11, 12, 13, 15, 21

Federal Rules of Civil Procedure, Rule 60(b)(1)-(5) 13

Federal Rules of Civil Procedure, Rule 60(b)(6) 13

Rules of Bankruptcy Procedure, Rule 7041 ..... 2, 17

Rules of Bankruptcy Procedure, Rule 9006(b) ... 12

1 ##

TABLE OF AUTHORITIES

RULES

	Page
Rules of Bankruptcy Procedure, Rule 9023	2, 12
Rules of Bankruptcy Procedure, Rule 9024	2, 9

Statute

United States Code, Title 28, Sec. 1254(1)	1

Textbooks

5 Moore, J., J. Lucas and J. Wicker, Moore's Federal Practice ¶ 41.14, pp. 41-200-41-201 (2nd Ed. 1986)	17
6A Moore, J., J. Lucas and G. Grotheer, Jr., Moore's Federal Practice ¶ 59.12[1] at 59-276 (2nd Ed. 1986)	12
6A Moore, J., J. Lucas and G. Grotheer, Jr. Moore's Federal Practice ¶ 60.03[1] at 60-17 (2nd Ed. 1986)	15
6A Moore, J., J. Lucas and G. Grotheer, Jr., Moore's Federal Practice ¶ 60.06[3] at 60-48 (2nd Ed. 1986)	19
7 Moore, J. and J. Lucas, Moore's Federal Practice, ¶ 60.22[1] at 60-174 (2nd Ed. 1985)	13
9 Wright, C. and A. Miller, Federal Practice and Procedure, Sec. 2372, pp. 233-234 (1971)	17
11 Wright, C. & A. Miller, Federal Practice and Procedure, Sec. 2854, p. 149 (1973)	14

No. 85-5750

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HANIL BANK,
Petitioner,
VS.
CARLYLE MICHELMAN, TRUSTEE
Respondent.

PETITION OF HANIL BANK FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS

The opinion of the court of appeals (App., *infra*, B-1 - B-7) is reported at 799 F.2d 532. The opinion of the district court (App., *infra*, C-1 - C-5) is not reported. The opinion of the bankruptcy court (App., *infra*, D-1 - D-4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered September 9, 1986. The order denying the request by petitioner for a rehearing was filed on November 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 41(b) (App., *infra*, G-1)

Federal Rule of Civil Procedure 59(e) (App., *infra*, G-)

Federal Rule of Civil Procedure 60 (App., *infra*, G-)

Bankruptcy Rule 7041 (App., *infra*, __G-)

Bankruptcy Rule 9023 (App., *infra*, __G-)

Bankruptcy Rule 9024 (App., *infra*, __G-)

STATEMENT OF THE CASE

The Ninth Circuit has held that Fed. R. Civ. P. 60(a) permits a trial judge to change a judgment at any time if the judge decides the judgment does not reflect what the judge originally intended. The trial judge can make this change without regard for whether it is substantive, involves discretionary decisions, or prejudices the party which acted in reliance on the original judgment. The trial court need not even have clear evidence in the record to support the original intention. To reach this result, the Ninth Circuit ignores the decisions of those circuits which restrict Rule 60(a) relief to true clerical errors. The result of the Ninth Circuit's decision is to undermine the finality of all decisions — particularly those where Fed. R. Civ. P. 41(b) was adopted to avoid such uncertainty.

1. In August, 1981, a creditor of Harvard Jee filed an involuntary bankruptcy proceeding against Jee. Respondent Carlyle Michelman was appointed trustee in the Jee case.

Prior to the bankruptcy, petitioner Hanil Bank had extended substantial financing to Jee and his companies. Jee collateralized Hanil's financing by pledging his stock

in The First State Bank Southern California ("FSB Stock").

On September 2, 1981, Hanil filed a complaint in Jee's bankruptcy seeking relief from the bankruptcy stay so Hanil could foreclose on the FSB Stock. E.R.[1] 165. Michelman failed to appear at the October 8, 1981 hearing on Hanil's complaint. E.R. 228, 232, 255. Nevertheless, Hanil put on evidence supporting the validity of its pledge and its right to foreclose. E.R. 255. On October 28, 1981, bankruptcy judge Robert Ordin granted Hanil relief from the bankruptcy stay. E.R. 232.

Michelman promptly filed a motion for a new trial and for an order vacating Hanil's relief from the stay. On December 10, 1981 bankruptcy Judge Ordin denied Michelman's motion and found no grounds for invalidating Hanil's pledge. E.R. 253-258. Michelman did not appeal Hanil's relief from stay or the denial of Michelman's motion for a new trial.

2. On October 1, 1981, the Korea Exchange Bank ("KEB"), another of Jee's creditors, filed suit to enjoin Hanil's foreclosure sale and to invalidate the pledge of stock to Hanil as a fraudulent conveyance. E.R. 1. KEB later joined Michelman as a defendant in the suit. E.R. 8. On November 2, 1981, four days after the bankruptcy court granted Hanil relief from the stay, KEB dismissed its claims. E.R. 26.

Michelman, however, had filed a cross-complaint against Hanil on October 29, 1981 which also sought to enjoin the foreclosure sale and to invalidate Hanil's pledge as a fraudulent conveyance. E.R. 31. On November 25, 1981, the bankruptcy court rescheduled the trial on

---

[1] "E.R." refers to the excerpt of record filed in the court of appeals.

Michelman's cross-complaint from December 3, 1981 to February 4, 1982 and ordered the parties to prepare and file a joint pre-trial order on January 22, 1982. E.R. 58. Hanil scheduled its foreclosure sale of the FSB Stock for February 17, 1982 and commenced extensive marketing efforts for the public sale. E.R. 139, 501.

When the trial date arrived on February 4, 1982, Michelman again failed to appear at trial. E.R. 612. He also had not helped prepare a joint pre-trial order. E.R. 169. In fact, Michelman had cancelled the only deposition that was scheduled and conducted no discovery in preparation for the trial which was set just two weeks before the foreclosure sale which Michelman sought to enjoin. E.R. 22, 574-580.

At the trial, bankruptcy judge Ordin was surprised to learn that Michelman had not appealed the earlier judgment granting Hanil relief from stay. Judge Ordin also learned that Hanil's scheduled foreclosure sale had not yet occurred. As Judge Ordin prepared to rule, Hanil advised Judge Ordin that there had been a discussion with Michelman two months earlier about the possiblity of continuing the trial. Judge Ordin responded that only he could order a continuance of the trial.[2] Without discussing the matter further, Judge Ordin dismissed the cross-complaint for lack of a pre-trial order and for failure to appear at trial. Nowhere in the transcript or in the dismissal order is there any statement that the dismissal is to be without prejudice. App., *infra, E-1 - E-J; F-1 - F-10.*

---

[2]There are two transcripts of the trial which vary on whether bankruptcy judge Ordin said he could only continue the trial or he could continue the trial. Both transcripts are attached in the Appendix. Judge Ordin later confirmed his policy that he, not the attorneys, decided whether to continue matters. In any event Judge Ordin did not continue the trial, he dismissed Michelman's cross-complaint.

In later hearings, Judge Ordin stated that his policy with parties who failed to appear was to deal strictly with failures to act. E.R. 698.

Michelman was served with a copy of the judgment of dismissal when it was lodged on February 5, 1982 and again when judgment was entered on February 18, 1982. E.R. 70-71. Michelman received both copies of the judgment of dismissal but took no immediate steps to object to or seek relief from the dismissal. E.R. 276-277.

3. After the dismissal Hanil went forward with its foreclosure sale and purchased the FSB Stock with a credit bid of $10,754,580.16 to reduce Hanil's loan loss. E.R. 140, 502. When Michelman took no further action regarding the dismissal, Hanil assumed the litigation risk was gone. After letting a $10.7 million dollar asset sit in its vault for over four months, in the summer of 1982, Hanil elected to seek approval to become a bank holding company to own and operate FSB. E.R. 140, 500-502.

On December 13, 1982 through the commitment of substantial time and expense, Hanil obtained the approval of the Federal Reserve Board of Governors to become a bank holding company. E.R. 141. One condition of the approval required Hanil to sell its interest in a New York investment banking firm, Korean Associated Securities, Inc. The Korean Ministry of Finance required Hanil to sell its interest at the original investment price rather than the current appreciated value. E.R. 504-505. In late 1982, Hanil also expended considerable time and money in preparing a tender offer to acquire the minority shares of FSB. E.R. 142. This all stopped when Michelman sought to reopen the litigation on the FSB Shares. Hanil would not have taken these steps if it knew the FSB Stock was subject to a litigation risk. E.R. 502-505.

4. On December 21, 1982, Michelman filed a motion for an order clarifying and specifying that the dismissal was without prejudice, or, in the alternative, for an order vacating the judgment of dismissal. Michelman's motion relied on both Rule 60(a) and Rule 60(b). At the hearing, Judge Ordin questioned Michelman about his unreasonable delay in challenging the dismissal, the lack of justification for the delay, and the prejudice to Hanil which had acted in reliance on the judgment of dismissal. E.R. 650-654, E.R. 659-660. A few days after the hearing, Judge Ordin stated he would deny Michelman's motion for relief. E.R. 671. Before entry of this decision, Michelman moved to reopen the hearing, urging Judge Ordin to reconsider his intent regarding the dismissal. At the hearing on February 17, 1983, Judge Ordin admitted that he had not yet determined his true "intent". Even though he had reviewed the February 4, 1982 transcript, Judge Ordin did not have a clear idea of what he intended at that time. E.R. 710. Judge Ordin did admit that if Michelman had appeared and explained his failure to proceed, Judge Ordin probably would not have made the dismissal with prejudice. E.R. 709.

Three weeks later, Judge Ordin announced he would grant Michelman's motion. Hanil then moved for reconsideration. After hearing arguments on April 21, 1983 regarding his power to change the judgment of dismissal under Rule 60(a), Judge Ordin took the matter under submission. Later that summer, he retired from the bench without ruling or issuing an order on any of the motions.

On March 27, 1984, a new bankruptcy judge entered his order granting Michelman's motion to clarify stating that the dismissal had always been without prejudice and is clarified so that it may clearly reflect that result. App. infra D-4.

5. Hanil appealed this order to the district court. On March 7, 1985, District Judge, Alice Marie Stotler reversed the decision of the second bankruptcy judge. The district court found that Michelman had not established any grounds for relief under Rule 60(b), nor had the motion been brought within a reasonable time. Michelman's motion was far too late to alter or amend the judgment under Fed. R. Civ. P. 59. Rule 60(a) was unavailable because the mistake, if any, was "not clerical but rather one of judgment." "A clerical error must be clearly reflected in the record. The record herein contains no reference to a dismissal without prejudice, nor can it be inferred that such was intended. Rule 60(a) cannot used to implement judicial afterthoughts". App. *infra* C-4 - C-5. The district court stated the result would be the same under *de novo* review or under the clearly erroneous standard. App. *infra* C-5.

6. The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment. The Ninth Circuit recognized that the judgment of dismissal was with prejudice when entered in accordance with Fed. R. Civ. P. 41(b). However, the Ninth Circuit gave the trial court basically unlimited scope to use Rule 60(a) to change an order to reflect the "actual intentions of the court, plus necessary implications". App. *infra,* B-5. A trial court is granted "very wide latitude in correcting clerical mistakes in a judgment." To support this conclusion, the Ninth Circuit cited three of its own cases and a Fifth Circuit case which states that Rule 60(a) applies to mistakes committed by a judge as well as by a clerk. The Ninth Circuit placed no requirement that a mistake be clearly and convincingly reflected in the record. App. *infra,* B-6 - B-7.

The Ninth Circuit only reviewed the trial judge's statement of his original intention on the clearly erroneous standard. App. *infra,* B-6. The Ninth Circuit concluded that the judge's own subsequent statement of his intent alone would support the lower court's decision. App. *infra,* B-7. In this case the Ninth Circuit also found statements at the original hearing which it felt could be construed to support that intent. App. *infra,* B-6. The Ninth Circuit's opinion does not mention Hanil's reliance on the original judgment. Under the Ninth Circuit's decision Hanil never had an opportunity to appeal the amended judgment of dismissal.

After deploying its assets and reorganizing its world wide operations in reliance on a judgment, Hanil now faces litigation over an asset it never would have touched had it known there was any risk of losing it. E.R. 502-505.

Hanil sought a rehearing of this decision with a suggestion that it be held *en banc.* The Ninth Circuit rejected Hanil's request to reconsider the expansive power being given to a trial judge to undercut the finality of a judgment. Nor would the Ninth Circuit consider the conflict of its ruling with the policy of Fed. R. Civ. P. 41(b) or the proper standard of review for determining the power to use Rule 60(a).

REASONS FOR GRANTING THE PETITION

The holding of the court of appeals conflicts with the decisions of the Fifth Circuit and the Eleventh Circuit on the power to grant relief under Fed. R. Civ. P. 60(a). While some circuits are struggling with the proper use of Rule 60(a), the majority seek to put limits on the changes which can be made by using Rule 60(a). The Ninth Circuit has opened Rule 60(a) to unlimited application. In the Ninth Circuit if a court decides it originally

intended a different result, the court can now make the change at any time no matter how dramatically the change affects the rights of the parties.

The approach of the Ninth Circuit to Rule 60(a) defeats the well reasoned scheme of the Federal Rules of Civil Procedure. The Ninth Circuit's use of Rule 60(a) ignores the principle of finality of judgments which is carefully considered for granting relief under Rule 60(b). In doing so, the Ninth Circuit's decision circumvents this Court's opinions which reasonably limit the availability of relief from judgments under Rule 60(b). Moreover, the Ninth Circuit's use of Rule 60(a) has gutted Fed. R. Civ. P. 41(b). Parties to litigation can no longer rely on Rule 41(b) to govern the effect of a judgment of dismissal. If left to stand, the Ninth Circuit's decision will affect the ability of all litigants in federal court to rely on the judgments of those federal courts.

This Court should resolve the standards for relief from judgments under Rule 60(a) and establish the proper standard for reviewing a trial court's use of Rule 60(a).

1. The court of appeals' decision in this case is in direct conflict with the holdings of the Fifth Circuit and the Eleventh Circuit on the power to use Rule 60(a).[3] The Ninth Circuit held that the trial court could change the original judgment to reflect what the trial court orally stated, over thirteen months after entering the judgment, must have been its original intent. The Ninth Circuit did not care that the change affected substantive rights of the parties nor did the Ninth Circuit even discuss the effect of the change on Hanil.

---

[3]Bankruptcy Rule 9024 (formerly Bankruptcy Rule 924) incorporates Fed. R. Civ. P. 60 into bankruptcy proceedings with certain exceptions which are irrelevant here.

The Eleventh Circuit reached a contrary result in *Mullins v. Nickel Plate Mining Co., Inc.*, 691 F.2d 971, 973-974 (11th Cir. 1982). In *Mullins* the trial court found it had originally intended to make a partial summary judgment immediately enforceable. The Eleventh Circuit rejected the trial court's use of Rule 60(a) to correct the judgment to reflect the court's intent. To have permitted the change would have affected substantial rights of the parties. In particular it would have deprived the losing party of its right to appeal. Since relief under Rule 60(a) does not affect the finality of the original judgment, the time for appealing the original summary judgment expired thirty days after it was entered even though it was later corrected.[4]

The Fifth Circuit reached the same conclusion. In *In re Galiardi* 745 F.2d 335 (5th Cir. 1984) the trial court used Rule 60(a) to amend an order it entered three years earlier transfering a case to New York. By amending the order to state the original basis for the transfer, the trial court would affect the plaintiff's ability to pursue her case in New York. The Fifth Circuit rejected the use of Rule 60(a) to correct errors which affect substantial rights of the parties. Rule 60(a) "does not grant a district court carte blanche to supplement by amendment an earlier order by what is subsequently claimed to be an oversight or omission." 745 F.2d at 337.

The First Circuit recognizes this limitation on Rule 60(a) as well. "The concept implied is that Rule 60(a) (which is unlimited in time) deals with mechanical corrections that do not alter the operative significance of the judgment, that could not affect a party's interest in taking

---

[4]*Beliz v. W. H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1326 (5th Cir. 1985)

an appeal, and that, therefore, can reasonably be made at any time." *Scola v. Boat Frances R., Inc.*, 618 F.2d 147, 152 fn.1 (1st Cir. 1980).

The Ninth Circuit's approach ignores the limits recognized for Rule 60(a) in the other three circuits. By using Rule 60(a) to remove the bar to Michelman's bringing suit on his claims against Hanil, the Ninth Circuit has affected substantial rights of the parties. Michelman can assert claims to Hanil's 10.7 million dollar asset after Hanil completed a corporate reorganization in reliance on the trial court's judgment terminating Michelman's right to pursue that asset. Hanil has also been deprived of its ability to appeal the original judgment which Hanil could have done if Hanil had known the judgment was truly to have been without prejudice. *See Safeway Stores v. Fannan,* 308 F.2d 94, 96 (9th Cir. 1962) (A defendant can appeal a dismissal which is without prejudice.).

If the Ninth Circuit's decision is allowed to stand, a trial court could change a judgment for plaintiff to a judgment for defendant several years after the judgment was entered. The trial court only needs to determine that it originally intended to rule for the defendant. In so doing the trial court will have denied the plaintiff the right to appeal which expired thirty days after the original judgment was entered several years earlier. A successful plaintiff in the First, Fifth or Eleventh Circuits would not face such a risk.

2. The question presented is important to all parties who litigate in the federal courts. The proper scope of Rule 60(a) affects the entire structure for relief from judgments provided by Rule 59(e), Rule 60(a) and Rule 60(b). In fact, the Ninth Circuit's use of Rule 60(a) circumvents the requirements of Rule 59(e) and Rule 60(b).

The Federal Rules of Civil Procedure seek to balance the importance of the finality of a judgment with the grounds for seeking relief from the judgment. In 1946, subsection (e) was added to Fed. R. Civ. P. 59(e).[5] expressly to confirm the power of a court to change a dismissal without prejudice to one with prejudice.[6] Rule 59(e) emphasizes the importance of changing the prejudicial effect of a judgment by requiring the motion to be made within ten days. In fact, the trial court has no power to enlarge the time for making a motion to alter or amend a judgment.[7] This Court expressly recognized that "Rule 59 in particular is based on an 'interest in speedy disposition and finality.' (citation omitted)." *Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257, 271, reh den 434 U.S. 1089 (1978). It is only reasonable that a party should move quickly to challenge a judgment which terminates a case with prejudice. Since substantial rights of the parties are being affected, a party must move promptly under Rule 59(e) before the other party relies on the effectiveness of the judgment.

Rule 60(b) authorizes a party to seek relief from a judgment more than 10 days after its entry. Relief can be sought for several reasons including mistake or in-

---

[5]Bankruptcy Rule 9023 (formerly Bankruptcy Rule 923) applies Rule 59 in bankruptcy cases.

[6]Advisory Committee Notes to Fed. R. Civ. P. 59; 6A J. Moore, J. Lucas and G. Grotheer, Jr., *Moore's Federal Practice* ¶ 59.12[1] at 59-276 (2nd Ed. 1986); *Sack v. Low,* 478 F.2d 360, 362-363 fn. 1 (2nd Cir. 1973).

[7]Bankruptcy Rule 9006(b) prohibits the extension of time for taking action under Bankruptcy Rule 9023 just as Fed. R. Civ. P. 6(d) prohibits the extension of the time period for a motion under Rule 59(e).

advertance by the litigants or the court.[8] In addition, the party seeking relief under Rule 60(b) must do so within a reasonable time. In the Ninth Circuit a reasonable time requires the court to balance: (1) the interests in finality; (2) the reason for delay in bringing the motion; (3) the practical ability of the moving party to learn earlier of the grounds relied upon for the motion; and (4) the prejudice to other parties. *Ashford v. Steuart,* 657 F.2d 1053, 1055 (9th Cir. 1981). In the case of mistake or inadvertence, Rule 60(b) requires that the reasonable time shall not exceed one year.

The Federal Rules of Civil Procedure have protected the finality of judgments by requiring fast action under Rule 59(e) or for relief under Rule 60(b) by carefully considering the effect of a change on the party relying on the judgment. This Court has protected the integrity of Rule 60(b) by carefully limiting the use of Rule 60(b)(6) which is the catchall provision allowing changes "for any other reason" within a "reasonable time." Rule 60(b)(6) may not be used to grant relief in situations which are covered by Rule 60(b)(1)-(5) but which do not qualify for relief under those sections. *Ackermann v. United States,* 340 U.S. 196, 197 (1950). Even the trial court would not grant Michelman relief under Rule 60(b) and it was far too late for Michelman to seek relief under Rule 59(e).

The other avenue for altering a judgment is Rule 60(a). It allows a court to correct clerical errors at any time. Rule 60(a) does not require the immediate action or the

---

[8]In 1946 Rule 60(b) was amended to allow its use to correct mistakes by the court as well as by the party seeking relief. *Lee v. Joseph E. Seagram & Sons, Inc.,* 592 F.2d 39, 43-44 (2nd Cir. 1979); 7 J. Moore and J. Lucas, *Moore's Federal Practice* ¶ 60.22[1] at 60-174 (2nd Ed. 1985).

balancing of policies because Rule 60(a) serves a different purpose. It does not provide relief from a judgment. Rule 60(a) merely corrects clerical errors to reflect what was actually decided. Professors Wright and Miller describe the situation well:

> "Subdivision (a) deals solely with the correction of errors that properly may be described as clerical or as arising from oversight or omission. Errors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b). Thus a motion under Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced."

11 C. Wright & A. Miller, *Federal Practice and Procudure*, Section 2854, p. 149 (1973)

Many appellate decisions seek to limit the use of Rule 60(a). Most circuits will not allow the use of Rule 60(a) to add prejudgment interest which has been inadvertently omitted from a judgment.[9] One court of appeal has rejected Rule 60(a) relief where a court order inadvertently gave more than 18 acres of farmland to the neighboring land owner.[10] Professor Moore also recognizes the limited

---

[9] *Lee v. Joseph E. Seagram & Sons, Inc.*, 592 F.2d 39, 43-44 (2nd Cir. 1979) (overruling an earlier Second Circuit decision granting such relief under Rule 60(a).); *Chicago North Western Railway Co. v. Union Pack. Co.*, 527 F.2nd 592 (8th Cir. 1976) (per curiam); *Gray v. Dukedom*, 216 F.2nd 108 (6th Cir. 1954); *contra*, *Glick v. White Motor Co.*, 317 F.Supp. 42, 45 (E.D. Pa. 1970) aff'd 458 F.2nd 1287 (3rd Cir. 1972).

[10] *Jones v. Anderson-Tully Co.*, 722 F.2nd 211, 212-213 (5th Cir. 1984) ("The mistake in the present case affects the substantive rights of the parties. It is not clerical, and if it in fact occurred, it is one of mistake, inadvertence, surprise, or excusable neglect governed by

role of Rule 60(a) and its proper relationship with Rule 60(b):

> "Subdivision (a) of Rule 60 allows the district court to correct clerical mistakes and errors without any time limitation upon its power.[1] Because of the deficiencies of original Rule 60(b),[2] which dealt with the matter of substantial relief, there was some tendency to balloon clerical mistakes and errors and include within those terms matters of some substance.[3] If the courts confine the terms clerical mis takes and errors to their plain meaning, as they now should do because of the carefully expanded provi sions of Rule 60(b),[4] there can, of course, be no objection to the correction of clerical mistakes and errors at any time. The finality of judgments is in no wise impaired."

6A J. Moore, J. Lucas and G. Grotheer, Jr., *Moore's Federal Practice* ¶ 60.03 [1] at 60-17 (2nd Ed. 1986)

The Ninth Circuit has ignored these limitations in the case involving Hanil. When Michelman could not qualify for relief under Rules 59(e) or 60(b), the Ninth Circuit has used Rule 60(a) to make an end run around the limitations of Rule 59(e) and Rule 60(b). Rule 60(b) will have rare application to the mistakes of a court if a court can ignore the tough balancing requirements of Rule 60(b) by simply describing the mistake as an oversight covered by Rule 60(a) which may be corrected at any time. The importance of the finality of judgments need never be considered.

The approach endorsed by the Ninth Circuit affects the integrity of the federal court system and its judgments.

Rule 60(b)(1) and barred by the Rule 60(b) one year statute of limitations")

Parties to litigation must arrange their lives and make business decisions about their assets based on the decisions of the federal courts. If substantive aspects of those decisions may be changed at any time without balancing the affect of that decision on the parties, the importance of a federal court judgment will be dramatically weakened.

At a time when this country is facing a litigation explosion, the courts should be looking for ways to conclude litigation instead of generating it. The Ninth Circuit ignores the obligation of an attorney to scrutinize orders of the court promptly. The attorney must decide if there is a need to challenge the ruling or to clarify it. This can be done quickly by motion to the trial court or by an appeal.

Instead of encouraging such diligence, the Ninth Circuit seeks to expand the avenues for attorneys to avoid that obligation without penalty. In this case, a judgment went unchallenged for over ten months. The district court could find no grounds to support such a belated change of the original judgment under any rule. Nevertheless, the Ninth Circuit allowed Michelman to reopen his case against Hanil some six years after the original judgment dismissed the case with prejudice. As a result, Michelman incurred no penalty for failing to appear at trial.

It is incumbent upon this Court to prevent such an abuse of the rules governing relief from judgments. The application of Rule 60(a) is not an isolated occurrence. This Court should give guidance to the federal courts on the proper application of Rule 60(a). In doing so this Court should interpret Rule 60(a) in the way this Court has directed since the adoption of the Federal Rules of Civil Procedure. "They shall be construed to secure the

just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

3. The Ninth Circuit's use of Rule 60(a) negates the policy and effect of Rule 41(b)[11] regarding judgments of dismissal. The circuit courts and this Court are in complete agreement that Rule 41(b) makes a judgment with prejudice unless it expressly states it is without prejudice.[12] Rule 41(b) seeks to avoid any need for speculation as to the intent of the court when dismissing a case even if the order fails to indicate whether or not it is with prejudice. *Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir., 1970) (en banc); 5 J. Moore, J. Lucas, and J. Wicker, *Moore's Federal Practice*, ¶ 41.14 pp. 41-200-41-201 (2nd Ed. 1986); 9 C. Wright & A. Miller *Federal Practice and Procedure* § 2372 pp. 233-234 (1971).

The Ninth Circuit's use of Rule 60(a) destroys the effectiveness of Rule 41(b). The Ninth Circuit agreed that the judgment of dismissal was originally with prejudice because there was no indication in the judgment or the transcript that the judgment was to be without prejudice. App., *infra*, B-4. Nevertheless, the Ninth Circuit allowed the use of Rule 60(a) to go behind Rule 41(b) to examine the intent of the judge. This destroys the ability of the parties to rely on Rule 41(b) in determining whether litigation has truly been terminated.

---

[11]Rule 41(b) is applicable in bankruptcy through Bankruptcy Rule 7041 (formerly Bankruptcy Rule 741)

[12]See e.g. *Costello v. United States*, 365 U.S. 265, 286-287 (1961), *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1237 (9th Cir. 1979), *cert. den.* 458 U.S. 1106 (1982); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978); *Kern v. Hettinger*, 303 F.2d 333, 339-40 (2nd Cir. 1962).

Whether a judgment of dismissal is with or without prejudice is of primary importance to the parties involved. It determines whether the dispute has been forever terminated and one party has lost its right to sue. The prejudicial effect of a judgment is of such importance that this Court adopted Rule 41(b) to clearly resolve that issue. By making the dismissal with prejudice this Court changed the normal result at common law. *Costello v. United States,* 365 U.S. 265, 285-286 (1961). This only emphasizes the strength of the policy decision to make a judgment with prejudice unless it is clearly stated to the contrary.

4. The appellate standard of review will determine the potential for abuse of Rule 60(a) relief. Whether a Rule 60 motion states any reason for relief usually involves a question of power, and therefore an issue of law. *Ackermann v. United States,* 340 U.S. 193 (1950). Even the Ninth Circuit has recognized that the review of the use of Rule 60 involves an issue of law. *Liberty Mutual Ins. Co., v. E.E.O.C.,* 691 F.2nd 438 (9th Cir. 1982). In this way the appellate court can monitor the proper use of the extraordinary remedy provided by Rule 60(a).

The Ninth Circuit has taken a much different approach in this case. After stating that Rule 60(a) allows a trial court to change a judgment to reflect the trial court's intent, the Ninth Circuit holds that the judge's subsequent statements of his intent will justify Rule 60(a) relief. App., *infra,* B-7. The court of appeals then rules that the trial judge's statement satisfies the clearly erroneous standard of review if there is any evidence in the record which might be interpreted to support the trial court's determination of its intent. App., *infra,* B-6 - B-7. In this case, sufficient supporting evidence consisted of a comment by Hanil's counsel regarding a telephone discus-

sion with Michelman's counsel two months prior to trial and an opening comment by Judge Ordin that Michelman's failure to appear must be due to some explanation of which he was unaware. App., *infra*, B-6. This gives little assurance that the trial judge truly had the intent he asserted thirteen months later.

This approach is entirely contrary to the proper level of review recognized by other authorities. Professor Moore recognized the need to limit the power to correct clerical mistakes to situations where there is a "clear showing of mistake." 6A J. Moore, J. Lucas and G.J. Grotheer, Jr., *Moore's Federal Practice* ¶ 60.06[3] page 60-48 (2nd Ed. 1986). The Fifth Circuit requires a clear showing of the mistake to uphold the use of Rule 60(a). When the record did not reveal an obvious intent which was inadvertently omitted, the Fifth Circuit refused to permit relief under 60(a). *In re Galiardi*, 745 F.2nd 335, 337 (5th Cir. 1984).

By failing to require the trial court's actions to be supported by clear evidence of a mistake, the Ninth Circuit has opened Rule 60(a) to abuse. Only by limiting its review to the trial court's statement could the Ninth Circuit ignore the overwhelming evidence which led the district court to find that the trial court's statement of intent was clearly erroneous. The bankruptcy judge was merely looking for a way to open the door for litigation against Hanil when he later learned that Michelman wanted to revive the litigation. This is exactly the type of risk about which this Court was concerned when using the power to correct inadvertent ministerial errors.[13] A trial court can always find some statement in the record which

---

[13] *American Trucking Association v. Frisco Transportation Company*, 358 U.S. 133, 146 (1958) ("Of course, the power to correct inadvertent ministerial errors may not be used as a guide for changing

might be interpreted to support a contrary ruling. If a court of appeal is willing to rely on the mere statement by the trial court or some minor reference in the record, there is little to limit a trial court's use of Rule 60(a) to reflect its "intent".

This Court must establish the standards of review necessary to be sure the mistake being alleged by the trial court truly occurred. Only in this way can the courts and the parties feel comfortable that Rule 60(a) is being used properly. Without an appropriate level of review by the appellate court, the statements of this Court on the proper use of Rule 60(a) will have little effect on the practical decisions of courts throughout the country. To them, Rule 60(a) can be used to do whatever they say they intended to have done.

This Court has never decided the proper scope and application of Rule 60(a). Such a decision is necessary to designate its proper role in the Federal Rules of Civil Procedure.

---

previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.")

CONCLUSION

This Court should resolve the trial court's power to use Rule 60(a). By doing so, this Court will preserve the integrity and policy of Rules 41(b), 59(e) and 60(b). The Court will also establish the proper balancing of interests when the finality of judgments are challenged. For these and the foregoing reasons, the petition for a writ of certiorari to the Ninth Circuit should be granted.

DATED: February 17, 1987.

Respectfully submitted,

M. DAVID MINNICK
LILLICK MCHOSE & CHARLES
725 South Figueroa Street
Suite 1200
Los Angeles, California 90017-2513
(213) 488-7100
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:
HARVARD M. JEE,
Debtor.

KOREA EXCHANGE BANK,
Plaintiff,

v.

THE HANIL BANK, LIMITED,
Defendant/Cross-Defendant/Appellee,

v.

CARLYLE MICHELMAN, Interim Trustee,
Cross-Claimant/Appellant.

Filed: November 18, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

No. 85-5750
DC No. CV. 84-2381-AHS

ORDER

Before: FLETCHER, FERGUSON and NELSON,
Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Fletcher and Nelson voted to reject the suggestion for a rehearing en banc, and Judge Ferguson so recommended.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re:
HARVARD M. JEE,
Debtor.

KOREA EXCHANGE BANK,
Plaintiff,
vs.
THE HANIL BANK, LIMITED,
Defendant/Cross-Defendant/Appellee,
vs.
CARLYLE MICHELMAN, Interim Trustee,
Cross-Claimant/Appellant.

Appeal from the United States District Court
for the Central District of California
Hon. Alicemarie Stotler, District Judge, Presiding

Argued & Submitted: February 5, 1986 Pasadena, California

Filed: September 9, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

No. 85-5750
USDC No. CV 84-2381-AHS

OPINION

Before: Fletcher, Ferguson and Nelson, Circuit Judges.
Nelson, Circuit Judge:

Carlyle Michelman, Harvard Jee's trustee in bankruptcy, appeals the district court's reversal of a bank-

ruptcy court's decision. The bankruptcy court had held that its dismissal of Michelman's cross-complaint, which was silent as to its prejudicial effect, was intended to be without prejudice, and amended that dismissal under Rule 60(a) of the Federal Rules of Civil Procedure accordingly. [1] The district court held that the dismissal was not intended to be without prejudice, and denied Rule 60(a) relief. We have jurisdiction under 28 U.S.C. § 158(d) (1982), and we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On August 14, 1981, a creditor of Harvard Jee instituted an involuntary bankruptcy proceeding against Jee. Appellant Carlyle Michelman was appointed trustee in the case.

Prior to the bankruptcy proceedings, Jee had pledged stock to appellee Hanil Bank, Limited, as collateral for a loan. On September 20, 1981, Hanil Bank filed a complaint for release from an automatic bankruptcy stay so that it could hold a foreclosure sale of this stock. Michelman failed to appear at an October 8 hearing regarding this complaint, and on October 28, 1981, the bankruptcy court granted relief to Hanil Bank. On December 10, 1981, the bankruptcy court denied Michelman's motion for a new trial and order vacating the relief from the stay. Michelman did not appeal these rulings.

Meanwhile, on October 1, 1981, the Korea Exchange Bank ("KEB"), another of Jee's creditors, had filed suit to enjoin the foreclosure sale, arguing that the pledge of stock to Hanil Bank was a fraudulent transfer. KEB later

---

[1] Rule 60(a) applies to adversarial bankruptcy proceedings through Bankruptcy Rule 9024.

joined Michelman as a defendant in the suit. On November 2, four days after the bankruptcy court granted Hanil Bank relief from the stay, KEB dismissed its claims.

Michelman, however, had filed a cross-complaint on October 29 (the day after Hanil was granted relief from the stay) also seeking to enjoin the foreclosure sale and to recover the fraudulently transferred stock. On November 25, the bankruptcy court ordered the parties to prepare and file a joint pretrial order, and reset the trial on the cross-compliant for February 4, 1982.

On February 4, however, Michelman failed to appear at trial. Neither had he helped prepare a joint pre-trial order. Accordingly, the bankruptcy court ordered that the cross-complaint be dismissed, and told Hanil Bank's counsel to prepare an appropriate order. The dismissal order prepared by Hanil Bank stated:

> No Joint Pre-Trial Order having been filed with the Court as ordered, and no appearance having been made by the Cross-claimant at trial.
>
> IT IS HEREBY ORDERED AND ADJUDGED that the Cross-claim in this matter is dismissed pursuant to Local Rule 28(b) and Bankrutcy Rule 905(d)(3).

Michelman was served with a copy of this order on February 5, and judgment was entered on February 18, 1982.

On December 21, 1982, Michelman filed a motion for an order clarifying and specifying that the dismissal was without prejudice, or, in the alternative, for an order

vacating the judgment of dismissal.[2] A few days after a hearing on this motion, bankruptcy judge Robert Ordin, who had presided over all previous aspects of the case, verbally stated that he would deny this motion. Before entry of this decision, Michelman moved to reopen the hearing, urging the judge to reconsider his intent regarding the dismissal. Thereafter, on March 4, 1983, the judge wrote counsel that he would grant the motion. Hanil Bank moved for reconsideration. Judge Ordin then retired, and a second bankruptcy judge granted the motion to clarify. In an order entered March 27, 1984,[3] the second bankruptcy judge stated that "[t]he dismissal of the Cross-Complaint entered herein on February 18, 1982 was then and always since has been a dismissal without prejudice," and that "the dismissal . . . is hereby clarified so that it may be expressly understood to have been and be a dismissal without prejudice and so that it may thereby clearly reflect the Court's ruling."

Hanil Bank appealed this order to the district court, which reversed the decision in a judgment entered March 7, 1985. The district court held that the dismissal clearly was intended to be on the merits.

---

[2]The judgment of dismissal is silent as to its prejudicial effect, and cites two rules which also are silent as to prejudicial effect. However, Rule 41(b) of the Federal Rules of Civil Procedure, which applies in bankruptcy through Bankruptcy Rule 7041, provides that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits." Thus, the original, unamended dismissal in the present case is considered to be with prejudice. *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1237 (9th Cir. 1979), *cert. denied*, 458 U.S. 1106 (1982); *Safeway Stores v. Fannan*, 308 F.2d 94, 96 (9th Cir. 1962).

[3]An order was entered on January 23, 1984, but was vacated because Hanil Bank did not receive notice.

The trustee then filed this timely appeal on April 5, 1985.

STANDARD OF REVIEW

Because we are in as good a position as the district court to review the findings of the bankruptcy judge, we review the district Court's decision *de novo*.[4] *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1445, (9th Cir. 1985). Accordingly, "we apply the clearly erroneous standard to the bankruptcy court's findings of fact. Conclusions of law are subject to *de novo* review." *In Re Mellor*, 734 F.2d 1396, 1399 (9th Cir. 1984) (citations omitted).

DISCUSSION

Rule 60(a) of the Federal Rules of Civil Procedure provides in part:

> *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

The bankruptcy court amended the order of dismissal under this Rule.

A judge may use Rule 60(a) "to make an order reflect the actual intentions of the court, plus necessary implications." *Jones & Guerrero Co. v. Sealift Pacific*, 650 F.2d

---

[4]Because we review the district court's decision *de novo*, we do not address the argument that the district court, in reviewing the bankruptcy court's decision *de novo*, applied the wrong standard of review. We note, however, that the district court stated that its conclusion would have been the same under the clearly erroneous standard.

1072, 1074 (9th Cir. 1981). Errors correctable under Rule 60(a) include those where what is spoken, written or recorded is not what the court intended to speak, write or record. *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984). A court may correct errors of this type even when not committed by the clerk; "it matters not whether the magistrate committed it — as by mistakenly drafting his own judgment — or whether his clerk did so. . . ." *Dura-Wood Treating Co. v. Century Forest Industries*, 694 F.2d 112, 114 (5th Cir. 1982); *see also Jones & Guerrero*, 650 F.2d at 1074 (rule allows correction of clerical mistakes not made by clerk). Thus, under Rule 60(a), a court has "very wide latitude in correcting clerical mistakes in a judgment." *Woodworkers Tool Works v. Byrne*, 191 F.2d 667, 676 (9th Cir. 1951).

The bankruptcy court's finding that Judge Ordin originally intended to dismiss Michelman's cross-complaint without prejudice is not clearly erroneous. At the hearing of February 4, 1982, Judge Ordin ordered the case dismissed only after Hanil Bank "would not oppose a continuance . . . or a voluntary dismissal, coupled with the restitution, institution of a new lawsuit which might be in a difficult [sic] procedural setting." In addition, Judge Ordin stated that he assumed that Michelman's failure to appear or file a pre-trial order was due to "some explanation, I don't know about." These circumstances support the finding that Judge Ordin fully expected Michelman to refile a new suit after the dismissal, and intended the dismissal to be without prejudice. *See Dura-Wood* 694 F.2d at 114 (rule applies where record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another).

Furthermore, in connection with Michelman's motion for an order specifying that the dismissal was without

prejudice, Judge Ordin explicitly stated in court that he originally had intended to dismiss the cross-complaint without prejudice. In the past, we have relied upon a judge's own subsequent statements of his intent in granting relief under Rule 60(a). *See Jones & Guerrero*, 650 F.2d at 1074. Judge Ordin's own recollections, combined with the circumstances surrounding the decision to dismiss, support the finding that Judge Ordin originally intended the dismissal to be without prejudice. Thus, we cannot say that the bankruptcy court's decision is clearly erroneous.

Accordingly, the district court's judgment is REVERSED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re HARVARD M. JEE,
Debtor.

KOREA EXCHANGE BANK,
Plaintiff,
vs.
THE HANIL BANK, LIMITED, et al.,
Defendants.

CARLYLE MICHELMAN, Interim Trustee,
Cross-Claimant,
vs.
THE HANIL BANK, LIMITED; HARVARD M. JEE, *Debtor;*
EUGENE T. CARLSON; EUN S. JEE;
BERRY D. LOCKE; and SANG J. KIM.
Cross-Defendants.

Entered: March 7, 1985, Clerk, U.S. District Court
Central District of California

Filed: March 6, 1985

No. CV 84-2381-AHS

JUDGMENT OF REVERSAL

Appellant Hanil Bank appeals from Bankruptcy Judge Ayer's Order of March 27, 1984 granting the Trustee's Motion to Clarify or Vacate the Judgment of Dismissal signed by Bankruptcy Judge Ordin on February 4, 1982. None of the parties contest the appealability of Bankruptcy Judge Ayer's Order.

A chronology of the proceedings and summary had in the Bankruptcy Court before the two judges will explain the history of this appeal.

8/81 — Involuntary bankruptcy petition filed.

10/8/81 — Hanil's Application for Relief from sec. 362(a) stay heard. Application unopposed by the Trustee.

10/27/81 — Bankruptcy Judge Ordin grants Hanil relief from sec. 362(a) stay.

10/81 — Korea Exchange Bank sues Hanil to enjoin foreclosure on pledge of debtor's stock held by Hanil. Trustee also is named as a defendant.

10/29/81 — Trustee files a cross-claim against Hanil seeking to enjoin foreclosure.

11/2/81 — Korea Exchange Bank dismisses complaint against Hanil and Trustee.

11/6/81 — Trustee moves to vacate 10/27/81 relief from stay order.

11/23/81 — Bankruptcy Judge Ordin denies Trustee's Motion to Vacate. Trustee does not appeal either the 10/27/81 order or the denial of the Motion to Vacate.

1/22/82 — Trustee fails to file Joint Pre-trial Order in accordance with Bankruptcy Court's Order re Preparation and Filing of Joint Pre-Trial Order filed 11/25/81.

2/4/82 — Trial on Trustee's cross-claim. Trustee fails to appear for trial. Judge Ordin dismisses cross-claim.

2/5/82 — Hanil lodges Judgment of Dismissal of Cross-claim with court.

2/18/82 — Bankruptcy Judge Ordin enters Judgment of Dismissal of Cross-claim. No appeal is taken.

12/21/82 — Trustee files Motion for Order Clarifying and Specifying that Dismissal of Cross-claim was Without Prejudice or, in the Alternative, for an Order Vacating Judgment of Dismissal of the Cross-claim (Trustee's Motion to Clarify/Vacate).

1/6/83 — Bankruptcy Judge Ordin denies Trustee's Motion to Clarify/Vacate.

1/27/83 — Trustee files Motion to Reopen Hearing and for Reconsideration of Trustee's Motion to Clarify/Vacate (Trustee's Motion to Reconsider).

2/17/83 — Bankruptcy Judge Ordin reconsiders on "intent" grounds.

3/9/83 — Bankruptcy Judge Ordin decides Judgment of Dismissal was to be without prejudice.

3/25/83 — Hanil files Motion to Reopen Hearing and for Reconsideration of Trustee's Motion to Clarify/Vacate (Hanil's Motion to Reconsider).

4/21/83 — Bankruptcy Judge Ordin hears Hanil's Motion to Reconsider and takes it under submission.

Summer, 1983 — Bankruptcy Judge Ordin retires without ruling on the motion. Case transferred to Bankruptcy Judge Ayer.

12/13/83 — Hearing before Bankruptcy Judge Ayer on all outstanding motions.

1/23/84 — Bankruptcy Judge Ayer enters order that Judgment of Dismissal was to be without prejudice. Order is vacated because Hanil was not properly served with proposed order.

3/27/84 — Bankruptcy Judge Ayer enters Order Granting Motions to Reopen Hearing, Granting Motion for Order Clarifying and Specifying that Dismissal of

Cross-Complaint was Without Prejudice, and Judgment of Dismissal of Cross-Claim was Without Prejudice.

4/5/84 — Hanil files Notice of Appeal.

This Court concludes that Bankruptcy Judge Ayer erred in interpreting the Judgment of Dismissal to have been made without prejudice. Fed.R.Civ.P. 41(b) specifies that a dismissal for want of prosecution without qualification operates as an adjudication upon the merits and thus is one with prejudice. Fed.R.Civ.P. 41(b); *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1237 (9th Cir. 1979). In view of the unequivocal language of Rule 41(b) and the absence of the words 'without prejudice' in either the ruling from the bench or in the Judgment of Dismissal, it is clear that the February 4, 1982, dismissal was on the merits and that it was intended to be on the merits. *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962).

The Trustee did not qualify for relief from the Judgment of Dismissal pursuant to the provisions of Fed.R.Civ.P. 59(e), 60(a) or 60(b). The Trustee's Motion was filed far too late to amend or alter the Judgment of Dismissal pursuant to Rule 59(e). The Trustee cannot qualify for relief pursuant to Rule 60(b) because the Motion was not brought within a reasonable time. Under the circumstances of this case, ten months cannot be found to "reasonable"; the converse would be more accurate. The Trustee has not established any grounds for relief under Rule 60(b). Resort to Rule 60(a) for relief is also unavailing. The mistake herein, if any, is not clerical but rather one of judgment. Such a mistake is not within the purview of Rule 60(a). *Dura-Wood Treating Co. v. Century Forest Industries, Inc.*, 694 F.2d 112, 114 (5th Cir. 1982). A clerical error must be clearly reflected in the record. The record herein contains no reference to a dismissal without prejudice, nor can it be inferred that

such was intended. Rule 60(a) cannot be used to implement judicial afterthought.

Pursuant to Local Bankruptcy Rule (e)(2)(B), the Court has reviewed this matter *de novo*. Rule (e)(2)(B) provides in part: "[T]he District Judge . . . may accept, reject or modify, in whole or in part, the order or judgment . . . of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge." However, were the Court to apply the clearly erroneous standard enunciated in Bankruptcy Rule 8013, the result in this case would be the same. *Cf. 1616 Reminc Limited Partnership v. Atchison & Keller Co.*, 704 F.2d 1313 (4th Cir. 1983).

It is the judgment of this Court that the March 27, 1984, Order granting the Trustee's Motion to Clarify or Vacate is hereby vacated and said Motion of the Trustee is hereby denied. Bankruptcy Judge Ordin's Judgment of Dismissal entered on February 17, 1982, stands as a Judgment of Dismissal with prejudice.

Dated: March 5, 1985

ALICEMARIE H. STOTLER
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re HARVARD M. JEE,
Debtor.

KOREA EXCHANGE BANK,
Plaintiff.

vs.

THE HANIL BANK, LIMITED, et al.,
Defendants.

CARLYLE MICHELMAN, Interim Trustee,
Cross-Claimant,

vs.

THE HANIL BANK, LIMITED; HARVARD M. JEE, *Debtor;*
EUGENE T. CARLSON; EUN S. JEE; BERRY D. LOCKE;
and SANG J. KIM,
Cross-Defendants.

Date: December 13, 1983
Time: 2:00 p.m.
Place: Courtroom "E"
Lodged: March 19 10:46 a.m. Clerk, U.S. Bankruptcy Court
Central District of California
Filed: March 21, 1984 Clerk, U.S. Bankruptcy Court
Central District of California
Entered: March 27, 1984 Clerk, U.S. Bankruptcy Court
Central District of California

Case No. LA-81-10230-RO
Adv. No. LA-81-4792-RO
[Chapter 7]

ORDER VACATING ORDER ENTERED JANUARY 23, 1984, GRANTING MOTIONS TO REOPEN HEARING, GRANTING MOTION FOR ORDER CLARIFYING AND SPECIFYING THAT DISMISSAL OF CROSS-COMPLAINT WAS WITHOUT PREJUDICE, AND CLARIFYING THAT JUDGMENT OF DISMISSAL OF CROSS-CLAIM WAS WITHOUT PREJUDICE

DANNING, GILL, GOULD,
JOSEPH & DIAMOND
a partnership composed of
professional corporations
1801 Century Park East
Suite 1500
Los Angeles, California 90067
(213) 277-0077
Attorneys for Cross-Claimant

AT LOS ANGELES, IN THIS DISTRICT. ON MARCH 21, 1984.

On January 6, 1983, the Motion of Carlyle Michelman, Chapter 7 Trustee for Order Clarifying and Specifying That Dismissal of Cross-Complaint was Without Prejudice, or, in the Alternative, for an Order Vacating Judgment of Dismissal of Cross-Complaint ("Motion to Clarify") came on for hearing before the Court; on February 17, 1983, the Trustee's Motion to Reopen that hearing came before the Court; on April 21, 1983, the Motion of Hanil Bank, Ltd. to Reopen that hearing came before the Court. At these hearings the Honorable Robert L. Ordin, United States Bankruptcy Judge presided. On November 9, 1983 all matters came before the Court for a status conference and all matters came before the Court for final argument on December 13, 1983. At the latter two hearings, the Honorable John D. Ayer, United States Bank-

ruptcy Judge presided. At all hearings, Danning, Gill, Gould, Joseph & Diamond, by Curtis B. Danning and David R. Weinstein appeared for Carlyle Michelman, Chapter 7 Trustee; Lillick, McHose & Charles, by M. David Minnick and Thor E. Buell, appeared for Hanil Bank, Ltd.

On January 23, 1984 the Court entered an Order Granting Motions to Reopen Hearing, Granting Motion for Order Clarifying and Specifying that Dismissal of Cross-Complaint Was Without Prejudice and Clarifying that Judgment of Dismissal Was Without Prejudice (the "January 23, 1984 Order"). It has come to the Court's attention that the January 23, 1984 Order was improvidently entered, there having been no notice to Hanil Bank, Ltd. that it had been lodged with the Court.

The Court has now read and considered the various moving and responding papers, the entire pleading file in this and all related matters and intermediate correspondence between the Court and counsel, has heard and considered arguments of counsel and is fully informed. It appearing that the judgment of dismissal (of cross-complaint) entered herein February 18, 1982 may be ambiguous on its face but was then intended by the Court to be a dismissal without prejudice, and the Court being fully informed, it is

ORDERED:

1. The January 23, 1984 Order is vacated and a nullity.

2. The Motions to Reopen the Hearing on the Motion to Clarify are each granted.

3. The Trustee's Motion to Clarify is granted.

4. The dismissal of the Cross-Complaint entered herein on February 18, 1982 was then intended by the Court to be a dismissal without prejudice.

5. The dismissal of the Cross-Complaint entered herein on February 18, 1982 was then and always since has been a dismissal without prejudice.

6. If the dismissal of the Cross-Complaint entered herein on February 18, 1982 is unclear on its face, it is hereby clarified so that it may be expressly understood to have been and be a dismissal without prejudice and so that it may thereby clearly reflect the Court's ruling.

7. This action and the relief sought by the various pending motions are proper subjects for determination by the bankruptcy court under the Local Rule of the United States District Court for the Central District of California Governing Bankruptcy Cases. This action and the relief sought and awarded herein are not "related matters" as that term is used in said Local Rule, but are "core matters" peculiarly within the province of the bankruptcy court. There should be no routine certification of this order to the United States District Court and no special circumstances exist to justify such certification. The request by Hanil Bank, Ltd. that this Court certify to the United States District Court the order determining the matters now pending before this Court and decided hereby is denied.

JOHN D. AYER
United States Bankruptcy Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re HARVARD M. JEE,
Debtor.

KOREA EXCHANGE BANK,
Plaintiff,

vs.

THE HANIL BANK, LIMITED, et al.,
Defendants.

CARLYLE MICHELMAN, Interim Trustee,
Cross-Claimant,

vs.

THE HANIL BANK, LIMITED;
HARVARD M. JEE, *Debtor;*
EUGENE T. CARLSON; EUN S. JEE;
BERRY D. LOCKE; and SANG J. KIM,
Cross-Defendants.

Lodged: Feb. 5 3:43 P.M. 1982
Clerk, U.S. Bankruptcy Court
Central District of California

Filed: Feb. 17, 1982 Clerk, U.S. Bankruptcy Court
Central District of California

Entered: Feb. 18, 1982 Clerk, U.S. Bankruptcy Court
Central District of California

Invol. No. 81-10230-RO
Adv. No. 81-3792-RO

JUDGMENT OF DISMISSAL

LILLICK MCHOSE & CHARLES
LAWRENCE W. DAM
ROBERT L. MORRISON
M. DAVID MINNICK
EDWIN F. FEO
707 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017
(213) 620-9000

Attorneys for Defendant
The Hanil Bank, Limited

Pursuant to the Court's Order of November 25, 1981 the Cross-claim of Interim Trustee CARLYLE MICHELMAN against THE HANIL BANK, LTD., HARVARD M. JEE, EUGENE CARLSON, EUN S. JEE, BERRY D. LOCKE and SANG J. KIM came on for trial at 2:00 p.m. on Feburary 4, 1982.

Lillick McHose & Charles by Lawrence W. Dam and M. David Minnick appeared on behalf of Cross-defendant THE HANIL BANK, LTD., and no appearance was made by Cross-claimant CARLYLE MICHELMAN or any other cross-defendant.

No Joint Pre-Trial Order having been filed with the Court as ordered, and no appearance having been made by Cross-claimant at trial.

IT IS HEREBY ORDERED AND ADJUDGED that the Cross-claim in this matter is dismissed pursuant to Local Rule 28(b) and Bankruptcy Rule 905(d)(3). . . . . .

. . . . . .

. . . . . .
United States Bankruptcy Judge

Submitted by

LILLICK MCHOSE & CHARLES
LAWRENCE W. DAM
ROBERT L. MORRISON
M. DAVID MINNICK
EDWIN F. FEO

By: LAWRENCE W. DAM
Attorneys for Defendant
The Hanil Bank,
Limited

APPENDIX F

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ROBERT L. ORDIN
Bankruptcy Judge

In the Matter of
HARVARD JEE

No. 81-10230
81-4792 RO

REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 4, 1981

Re: Trial re cross-claim of Caryle Michelman, Interim Trustee, re sale of stock.

Reported by:
Robert D. Marsh, CSR 3341

HALL & PATTEE
Certified Shorthand Reporters, Inc.
9441 Wilshire Blvd., 2nd Flr.
Beverly Hills, California 90212
272-9937/275-1953

APPEARANCES OF COUNSEL

Lawrence Dam & Dave Minnick	Hanil Bank, et. al.

The following is a stenographic transcript of the proceedings in the above-entitled cause which came on for hearing before the Honorable Robert L. Ordin, United States Judge in Bankruptcy at Courtroom "B" 312 North

Spring Street, Los Angeles, California at the hour of 2:00 p.m. on Thursday, February 4, 1981.

THE COURT: Harvard Jee.

Anybody here on Harvard Jee? What are you all doing here?

MR. DAM: I am not sure.

THE COURT: Explain?

MR. MINNICK: Lawrence Dam and David Minnick on behalf of Hanil Bank, the defendant.

THE COURT: What is going on in the cross-complaint? What is happening?

MR. MINNICK: In a word, nothing.

THE COURT: Well, I seem to have a trial here — The cross-claim of Caryle Michelman who is now represented by highly experienced bankruptcy firm, David Gil. There is no joint pre-trial order and that is not typical of that office so I assume there has got to be some explaination I don't know about.

MR. MINNICK: Well, there was some communications. As you know, Hanil Bank was granted relief from the automatic stay. Since last October, we have been in the process of conducting a public sale of that stock.

THE COURT: Wait a minute. Did that not get appealed?

MR. MINNICK: It did not.

THE COURT: You mean the new lawyers for the trustee didn't go to the Appelate panel on that?

MR. MINNICK: No.

THE COURT: They may have had the way and nothing was done.

MR. MINNICK: They did not, your Honor. There is a lot of things about this litigation that I cannot explain.

THE COURT: I was just curious.

MR. MINNICK: We were told on various occasions that injunction proceedings would be filed and an attempt would be made to enjoin the sale of stock. Our response to that as always was you have to do what you have to do.

THE COURT: We will meet it when we get there, but not in the bankruptcy court though, would it?

MR. MINNICK: I don't know where it would be? Our position was that we were going forward with that sale and the announcement appeared in the Wall Street Journal and the L.A. Times and various publications.

THE COURT: Did you have the sale?

MR. MINNICK: The last date for bids is tomorrow, I believe, and so we alerted Mr. Gil and Mr. Gould told him that we believe that our rights would be prejudiced the longer they waited and the equitable principle would weigh in our favor. They waited until the last minute to enjoin the sale but — I guess this week. We were advised that they decided they weren't going to try to enjoin the sale.

THE COURT: Hold on a minute. Doesn't the allegations of the cross-claim which is seemingly to be heard for trial today support an established basis to stop the sale? Isn't that the idea?

MR. MINNICK: There is a claim upon which an injunction might be based.

THE COURT: But there is nobody here to press it.

MR. MINNICK: That is correct.

THE COURT: Any other appearance for the —

MR. MINNICK: In fairness to the Trustee there was a conversation in mid-December and in that conversation there was reference made to a possibility of a need to continue this trial so that discovery could be performed by the parties.

THE COURT: Well, I can only order continuing the trial.

MR. MINNICK: Our response to that was, you know, send some stipulation over, and we would not oppose a continuance and we would not oppose a voluntary dismissal coupled with the institution of a new lawsuit which might be in a difficult procedural setting to go forward when the original complaint has been dismissed as this one. We made it very clear we were not waiving anything and that was the last we have heard.

THE COURT: There is nothing before me today because the cross-claim is not in court. There is no pre-trial order that has been filed on the matter. The cross-complaint is dismissed. Prepare an appropriate order which sets forth those things.

MR. MINNICK: Very good, your Honor.

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss:

I, ROBERT D. MARSH, CSR 3341 Official Reporter, do hereby certify that the foregoing 5 pages comprise the full proceedings had in the within entitled matter before the Honorable Robert L. Ordin, Bankruptcy Judge, on the date specified therein.

ROBERT D. MARSH
Official Reporter

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ROBERT L. ORDIN
Bankruptcy Judge

In the Matter of
HARVARD JEE

No. 81-10230
81-4792

REPORTER'S TRANSCRIPT OF PROCEEDINGS
February 4, 1982

Reported by:
Robert D. Marsh, CSR 3341
APPEARANCES OF COUNSEL
Larry Dam and Dave Minnick Hanil Bank, et. al.

The following is a stenographic transcript of the proceedings in the above-entitled cause which came on for hearing before the Honorable Robert L. Ordin, United States Judge in Bankruptcy at Courtroom "b" 312 North Spring Street, Los Angeles, California at the hour of 2:00 p.m. on Thursday, February 4, 1982.

THE COURT: Harvard Jee. What are you all doing here?

MR. DAM: I am not sure I know. Lawrence Dam and David Minnick on behalf of the Hanil Bank.

THE COURT: What is going on in the cross-complaint? What is happening?

MR. DAM: In a word?

THE COURT: Well, I have seem to have the trial here, the cross-complaint of Caryle Michelman, who is now represented by highly experienced bankruptcy firm. David Gill. There is no joint pre-trial order and that is not typical of that office so I assume there is got to be some explanation. I don't know about.

MR. DAM: Well, there was, there was some communications. As you know Hanil Bank was granted relief from the automatic stay. Last October, we have been in the process of conducting a public sale of that stock.

THE COURT: Wait a minute. Did that not get appealed?

MR. DAM: It did not.

THE COURT: That is the final order. You mean the new lawyers for the trustee did not go to the Appellate Panel on that?

MR. MINNICK: No.

THE COURT: They made the motion for reconsideration. They may have made the way and nothing was done.

MR. DAM: They did not your Honor. There are a lot of things about this litigation that I cannot explain.

THE COURT: Oh, a lot of things are none of my business. I was just curious.

MR. DAM: We were told on various occasions that injunction proceedings would be filed and an attempt would be made to enjoin the sale of stock. Our response to that was always, do what you have to do.

THE COURT: We will meet that when we get there, but not in the bankruptcy court though, would it?

MR. DAM: I don't know where it would be. Our position was that we were going forward with that sale and the announcement appeared in the Wall Street Journal and the L.A. Times and various publications.

THE COURT: Did you have the sale?

MR. DAM: The last date for bids is tomorrow, I believe, and so we alerted Mr. Gill and Mr. Gould told him that we believe that our rights would be prejudiced the longer they waited and the equitable principle would weigh in our favor. They waited until the last minute to go and try to enjoin the sale. We were advised that they decided — That they were not going to try to enjoin the sale.

THE COURT: Hold on a minute. Doesn't the allegations of the cross-claim which is seemingly to be heard for trial today establish the basis to stop the sale? Wasn't that the idea?

MR. DAM: There is a claim upon which an injunction might be based. I think their equities include these because of the time.

THE COURT: But there is nobody here to press it.

MR. DAM: That is correct.

THE COURT: Any appearances for the trustee?

MR. DAM: In mid December there was reference made to a possibility of a need to continue this trial so that discovery could be performed by the parties.

THE COURT: Well, I can order the continuing of the trial.

MR. DAM: Our response to that was, you know, send some stipulation over and we would not oppose a continuance and we would not oppose a voluntary dismissal,

coupled with the restitution, institution of a new lawsuit which might be in a difficult procedural setting to go forward when the original complaint has been dismissed as this one and Mr. Minnick talked about it, and we made it very clear, we were not waiving anything and that was the last we have heard.

THE COURT: There is nothing before me today because the cross-complaint is not in court. There is no pretrial order that has been filed in the manner. The cross-complaint is dismissed. Prepare an appropriate order which sets forth those things.

MR. DAM: Very good your Honor.

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss:

I, ROBERT D. MARSH, CSR 3341 Official Reporter, do hereby certify that the foregoing 5 pages comprise the full proceedings had in the within-entitled matter before the Honorable Robert L. Ordin, Bankruptcy Judge, on the date specified therein.

ROBERT D. MARSH
Official Reporter

APPENDIX G

RULES OF CIVIL PROCEDURE

RULE 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968.)

RULE 59. New Trials; Amendment of Judgments

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

RULE 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a

prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

RULES OF BANKRUPTCY PROCEDURE

Rule 7041.

DISMISSAL OF ADVERSARY PROCEEDINGS

Rule 41 F. R. Civ. P. applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee and only on order of the court containing terms and conditions which the court deems proper.

Rule 9023.

NEW TRIALS; AMENDMENT OF JUDGMENTS

Rule 59 F. R. Civ. P. applies in cases under the Code, except as provided in Rule 3008.

Rule 9024.

RELIEF FROM JUDGMENT OR ORDER

Rl 60 F. R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 or § 1330.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 17, 1987, I served the within Petition for Writ of Certiorari in re: "Hanil Bank vs. Carlyle Michelman" in the United States Supreme Court, October Term 1986, No. 85-5750;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Curtis B. Danning
Danning, Gill, Gould, Joseph & Diamond
1800 Century Park East
Los Angeles, California 90067
Attorney for Respondent

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 17, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
MAR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 86-1378

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HANIL BANK,
Petitioner,

VS.

CARLYLE MICHELMAN, Trustee
Respondent.

OPPOSITION OF RESPONDENT CARLYLE MICHELMAN, TRUSTEE, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANNING, GILL, GOULD, DIAMOND
& SPECTOR
CURTIS B. DANNING*
RICHARD K. DIAMOND
1800 Century Park East
Seventh Floor
Los Angeles, California 90067
(213) 277-0077
Counsel for Respondent

**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers (213) BOWNE CO

2697

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals, in reversing the district court's reversal of the bankruptcy court's order determining its prior dismissal to have been without prejudice, has decided a special and important question of federal law in a way which is clearly in conflict with an applicable decision of this Court in an identical matter?

2. Whether the court of appeals, in reversing the district court's reversal of the bankruptcy court's order determining its prior dismissal to have been without prejudice, has acted in a manner which is in substantial conflict with a decision of another court of appeals in an identical matter?

3. Whether the court of appeals, in reversing the district court's reversal of the bankruptcy court's order determining its prior dismissal to have been without prejudice, has decided an important question of federal law which has not, but should be settled by this Court?

4. Whether the court of appeals, in reversing the district court's reversal of the bankruptcy court's order determining its prior dismissal to have been without prejudice, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

TABLE OF CONTENTS

	Page
Statement of Questions Presented for Review	i
I	
Statement Regarding Parties, Opinions, Jurisdiction Below, Statutes, and Rules Involved	1
II	
Statement of the Case	2
A. Procedural History	2
B. Statement of Facts	5
III	
Summary of Argument	9
IV	
Argument	10
A. The Requested Writ Should Not Issue Because None of the Special and Important Grounds for Granting a Writ of Certiorari Exist in This Case	10
B. The Decision of the Ninth Circuit Court of Appeals is Not in Conflict With the Decisions of the Other Circuits	11
C. The Ninth Circuit's Opinion Does Not Circumvent Rule 41(b)	16
V	
Conclusion	19

TABLE OF AUTHORITIES

Cases

Page

Boazman v. Economics Lab, Inc., 537 F.2d 210 (5th Cir. 1976) 15

Brunswick Corp. v. Chrysler Corp., 408 F.2d 335 (7th Cir. 1969) 14

E.E.O.C. v. Safeway Stores, Inc., 611 F.2d 795 (10th Cir. 1979) 14

Flaksa v. Little Ricer Marine Construction Co., 389 F.2d 885 (5th Cir.), cert. denied, 392 U.S. 928 (1968) 15

Galiardi, In re, 745 F.2d 335 (5th Cir. 1984) 14, 15

Graves v. Kaiser Aluminum & Chemical Co., 528 F.2d 1360 (5th Cir. 1976) 15

Huey v. Teledyne, 608 F.2d 1234 (9th Cir. 1979)... 11

Jones & Guerrero Co., Inc. v. Sealift Pacific, 650 F.2d 1072 (9th Cir. 1981) 11, 12

Judkins v. Beech Aircraft Corp., 723 F.2d 818 (11th Cir. 1984) 15

Kincade v. Jeffery-DeWitt Insulation Corporation, 242 F.2d 328 (5th Cir. 1957) 14

La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265 (2d Cir. 1974) 17

Madesky v. Campbell, 705 F.2d 703 (3d Cir. 1983) 15

Mullins v. Nickel Plate Mining Co., Inc., 691 F.2d 971 (11th Cir. 1982) 14

Navarro v. Chief of Police of Des Moines, Iowa, 523 F.2d 214 (8th Cir. 1975) 15

Pattiz v. Schwartz, 386 F.2d 300 (8th Cir. 1968) ... .11, 13, 14

TABLE OF AUTHORITIES

CASES

Page

Scola v. Boat Frances, R., Inc., 618 F.2d 153 (1st Cir. 1980) 14, 15

Security Mut. Cas. Co. v. Century Cas. Co., 621 F.2d 1062 (10th Cir. 1980) 11

Talbert v. Leighton, 623 F.2d 585 (9th Cir. 1980) .. 15

Thomas v. Gerber Productions, 703 F.2d 353 (9th Cir. 1983) 15

United States v. 60.22 Acres of Land, etc., 638 F.2d 1176 (9th Cir. 1980) 12, 13

United States v. Thompson, 114 F. Supp. 874 (S.D.N.Y. 1953) 17, 18

Warner v. City of Bay St. Louis, 526 F.2d 1211 (5th Cir. 1976) 11

Webber v. Eye Corp., 721 F.2d 1067 (7th Cir. 1983) 15

Witt v. United States, 681 F.2d 1144 (9th Cir. 1982) 15

Zaroff v. Holmes, 379 F.2d 875 (D.C. Cir. 1967) ... 18

Rules

Bankruptcy Rules, Rule 924 ..... 3, 11

Bankruptcy Rules, Rule 9024 3

Federal Rules of Civil Procedure, Rule 41(b) 16, 17, 18

Federal Rules of Civil Procedure, Rule 54 14

Federal Rules of Civil Procedure, Rule 60 3

Federal Rules of Civil Procedure, Rule 60(a) 2, 9, 11, 12, 13, 14, 16, 19

Local Rules of United States District Court for the Central District of California, Local Rule 12.4 .. 18

TABLE OF AUTHORITIES

RULES

	Page
Rules of the Supreme Court of the United States, Rule 17	10
Rules of United States Bankruptcy Court, Rule 905(d)(3)	7
Rules of United States District Court, Rule 28(b)	7

Statutes

Guam Code of Civil Procedure, Sec. 337	12

Textbooks

5 American Law Reports Fed. pp. 897, 899	17
5 Moore's Federal Practice, Sec. 41.11[2] (2nd ed. 1984)	17

No. 86-1378

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HANIL BANK,
Petitioner,

VS.

CARLYLE MICHELMAN, Trustee
Respondent.

OPPOSITION OF RESPONDENT CARLYLE MICHELMAN, TRUSTEE, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Carlyle Michelman, Trustee, respectfully opposes the petition filed by Hanil Bank for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I.

STATEMENT REGARDING PARTIES, OPINIONS, JURISDICTION BELOW, STATUTES, AND RULES INVOLVED

Respondent concurs with the position taken by petitioner at pages ii, 1 and 2 of its petition relative to the identity of interested parties, the prior opinions, the basis

for jurisdiction of this Court and the statutes and rules involved in this matter.

II.

STATEMENT OF THE CASE

A. Procedural History.

By the opinion sought to be reviewed, the Ninth Circuit Court of Appeals reinstated the order of the bankruptcy court clarifying that its Judgment of Dismissal had at all times been intended to be, and was, a dismissal without prejudice. The Ninth Circuit found ample evidence in the record to support the finding that the trial court's intention was to dismiss without prejudice and concluded that it was an appropriate exercise of the court's authority under Rule 60(a) of the Federal Rules of Civil Procedure (hereinafter "FRCP 60(a)") to clarify the judgment to reflect the court's original intention which had been inadvertently left ambiguous.

On August 14, 1981, involuntary bankruptcy cases were commenced against Harvard M. Jee (hereinafter the "debtor") and Petrous Industries, Inc., one of the debtor's wholly owned companies, and, thereafter, respondent Carlyle Michelman was appointed trustee in the cases (hereinafter the "trustee").

On October 1, 1981, an adversary proceeding was commenced by the Korea Exchange Bank (hereinafter "KEB") which sought to enjoin petitioner Hanil Bank, Ltd. (hereinafter "Hanil") from holding a foreclosure sale of a controlling interest in the First State Bank which Hanil held as collateral for a loan to the debtors on the grounds that the pledge to Hanil constituted a fraudulent conveyance. KEB joined the trustee as a defendant

in the adversary proceeding (E.R. 1).[1] On October 29, 1981, the trustee, *in propria persona,* responded to the KEB complaint and filed a cross-complaint seeking to enjoin the sale and recover the fraudulent conveyance (E.R. 31). Hanil responded to the cross-complaint on November 17, 1981 (E.R. 50). On November 25, 1981, the bankruptcy court entered its Order re (1) Preparation and Filing of Joint Pretrial Order; (2) Vacating Trial Date; and (3) Re-setting Trial Date (E.R. 58). It was the bankruptcy court's normal practice to set all disputed matters for trial by this order and to use the "trial" date as a status conference if the matter was anything but a routine action such as a simple complaint for relief from the automatic stay. No appearance was made by the trustee's counsel at the February 4, 1982 hearing and the matter was ordered dismissed (R.T., February 4, 1982). The court entered its Judgment of Dismissal, in the form prepared by Hanil's counsel, on February 18, 1982 (E.R. 68).

On December 21, 1982, the trustee filed his Motion for Order Clarifying and Specifying that Dismissal of Cross-Claim was Without Prejudice or, in the Alternative, for an Order Vacating Judgment of Dismissal of the Cross-Claim (hereinafter the "Motion to Clarify") (E.R. 72). The Motion to Clarify sought a determination that the dismissal was without prejudice or to vacate the judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure as made applicable to the proceeding by former Bankruptcy Rule 924.[2] At a hearing on the Motion to

---

[1]E.R. refers to the Excerpt of Record filed in the court of appeals. R.T. refers to the Reporter's Transcript of hearings held in the bankruptcy court, and is followed by the date on which the hearing was held.

[2]Substantially identical provisions are now contained in Bankruptcy Rule 3024 which became effective August 1, 1983.

Clarify held on January 6, 1983, the Bankruptcy Judge, Judge Robert L. Ordin, indicated from the bench his intention to deny the motion (R.T., January 26, 1983).

On January 28, 1983, prior to the entry of any order on the Motion to Clarify, the trustee filed his Motion to Reopen Hearing and for Reconsideration of Trustee's Motion to Clarify (E.R. 265). This motion sought to have the bankruptcy judge reconsider his orally announced ruling on the Motion to Clarify to consider whether his intention in making the original Judgment of Dismissal was clearly expressed in the written judgment. After taking the matter under submission, on March 4, 1983, the bankruptcy judge wrote to counsel announcing his decision, upon reconsideration, to grant the Motion to Clarify because he had originally intended the Judgment of Dismissal to be a dismissal without prejudice (E.R. 583). Thereafter, before a written order was entered, Hanil moved for reconsideration. After argument, Hanil's motion for reconsideration was taken under submission (R.T., March 25, 1983). Prior to its decision, Bankruptcy Judge Ordin, who had heard all of the previous matters, retired.

The case was then transferred to Bankruptcy Judge John D. Ayer, who, after considering all of the pending motions and hearing argument, granted the Motion to Clarify and entered the Order Granting Motion for Order Clarifying and Specifying that Dismissal of Cross-Complaint Was Without Prejudice and Judgment of Dismissal of Cross-Complaint Was Without Prejudice (hereinafter the "Order Clarifying") which was the subject of the appeal to the district court (E.R. 525, 588).

On April 5, 1984, Hanil filed its Notice of Appeal to the district court (E.R. 564). On February 11, 1985, the district court held a hearing on the appeal. On March 7, 1985, the district court entered its Judgment of Reversal

(E.R. 587). The trustee brought a timely appeal from the district court's Judgment of Reversal to the Ninth Circuit Court of Appeals which entered its opinion reversing the district court on September 9, 1986. Hanil's motion for rehearing was denied on November 18, 1986. It is this opinion which is the subject of Hanil's petition to this Court.

B. Statement of Facts.

Much of the factual basis necessary to the determination of this petition is the procedural history of the litigation set forth above. However, an understanding of the factual context of the underlying litigation is also helpful to a consideration of the issues presented. Prior to the commencement of the Chapter 7 cases on August 14, 1981, the debtor owned or controlled approximately 85% of the stock of First State Bank (hereinafter the "stock") which was valued at between ten and fifteen million dollars. The stock was pledged by the debtor to Hanil to secure the pre-existing debts of third parties. Hanil obtained relief from the automatic stay to foreclose upon the stock on October 28, 1981 (E.R. 165, 225). In the interim, KEB had commenced the adversary proceeding which gives rise to this petition (E.R. 1). An order dismissing KEB's complaint pursuant to stipulation with the trustee was entered on November 16, 1981 (E.R. 26), and the restraint imposed by another stipulation was vacated upon Hanil's motion granted by order entered on December 21, 1981 (E.R. 60). Thus, after December 21, 1981, all of the bars to the foreclosure sale of the stock had been eliminated.

At this juncture, counsel for the trustee and Hanil discussed dismissal of the cross-claim so that the case could be litigated in a subsequent action which would not involve requests for injunctive relief and which could

proceed after the parties had had an opportunity to investigate and develop more thoroughly the underlying facts. Counsel also discussed arrangements for the sale of the stock. Although counsel for the trustee sought to have the stock sold by the trustee under the supervision of the bankruptcy court, Hanil insisted on conducting the sale itself as it expected to be the high bidder at the sale and had taken substantial steps to arrange the transfer of control of First State Bank to Hanil, including obtaining regulatory approvals which were valid for only a limited time (E.R. 91-94, 276-284, 287,291).

In this context, the trustee did not appear in court on February 4, 1982. That hearing was the first held in the case and, given the nature of the matter and the factual complexities involved, it would not normally have been the time at which trial would have occurred. At the hearing, the following exchange occurred between Hanil's counsel and the court:

> THE COURT: "What is going on in the cross-complaint? What is happening?"
>
> MR. MINNICK: "In a word, nothing."[3]
>
> THE COURT: "Well, I seem to have a trial here — the cross-claim of Carlyle Michelman who is now represented by a highly experienced bankruptcy firm, David Gil [sic]. There is no pre-trial order and that is not typical of that office so *I assume there has got to be some explaination* [sic] *I don't know about.*"
>
> • • • •
>
> MR. MINNICK: "In fairness to the trustee there was a conversation in mid Decmber [sic] and in that

---

[3]See comment in note 5 below regarding word "nothing" at this point.

conversation there was reference made to a possibility of *a need to continue this trial so that discovery could be performed by the parties."*

THE COURT: *"Well, I can only order continuing the trial."*[4]

MR. MINNICK: "Our response to that was, you know, send some stipulation over, and *we would not oppose a continuance and we would not oppose a voluntary dismissal coupled with the institution of a new lawsuit* which might be in a difficult [sic] procedural setting to go forward when the original complaint has been dismissed as this one. We made it very clear we are not waiving anything and that was the last we have heard."

THE COURT: *"There is nothing before me today because the cross-claim* [sic] *is not in court.* There is no pre-trial order that has been filed on the matter. The cross-complaint is dismissed. *Prepare an appropriate order which sets forth those things."* (R.T., February 4, 1982, p. 5) (emphasis added).[5]

Counsel for Hanil then lodged a judgment reciting that the cross-claim was "dismissed pursuant to Local Rule 28(b) and Bankruptcy Rule 905(d)(3)"[6] and this judg-

---

[4]See comment in note 5 below regarding word "only" at this point.

[5]It should be noted that two versions of the Reporter's Transcript of the February 4, 1982 proceedings were prepared. Except as otherwise noted, the trustee herein refers to the Transcript as originally prepared. The second version differs from the first in that, among other things, the main speaker for Hanil is identified as Mr. Dam, rather than Mr. Minnick; the word "nothing" is deleted at p. 3, l. 10 and the word "only" is deleted at p. 5, l. 10.

[6]Presumably, these were references to Rule 28(b) of the Local Rules of the United States District Court and Local Rule 905(d)(3) of the United States Bankruptcy Court.

ment was entered by the court on February 18, 1982 (E.R. 68). On the previous day, Hanil had conducted its foreclosure sale of the stock and acquired by credit bid a controlling interest in the First State Bank (R.T., February 17, 1983, p. 12, l. 12-21). Notwithstanding their unsupported protestations of prejudice, it is clear that Hanil always intended to acquire the Bank and none of the lower courts have ever found Hanil to have suffered prejudice.

On December 21, 1982, the trustee filed his Motion to Clarify (E.R. 72). After first disagreeing on other grounds, the trial court ruled that the Motion to Clarify should be granted since it was its intention at the "trial" on February 4, 1982, and at all material times, to dismiss without prejudice (E.R. 525, 564). These facts are explicitly set forth in a letter to counsel announcing that court's decision signed by Judge Ordin on March 4, 1983 (E.R. 583).

Hanil next moved to reopen the hearing on the Motion to Clarify before the trial court (E.R. 359). Judge Ordin indicated no change of position but took the matter under submission (R.T., April 21, 1983). He retired before entering an order and his successor, Judge Ayer, correctly found that Judge Ordin knew that he intended at all times to enter a dismissal without prejudice and that he did precisely that by the judgment entered on February 18, 1982 (E.R. 525, 564).

On appeal, the district court concluded that, notwithstanding the bankruptcy judge's intention as revealed in the record and as expressly stated in his letter ruling, the Judgment of Dismissal had to be considered as an adjudication on the merits. Therefore, the district court ordered the order of the bankruptcy court vacated and the trustee's motion denied (E.R. 587).

The Ninth Circuit Court of Appeals reversed. It reviewed the record and found numerous indications, both in the transcript of the February 4, 1982 hearing and in the subsequent letter ruling, supporting the finding that the bankruptcy court's intent had always been to dismiss without prejudice. It therefore held that the use of FCRP 60(a) to make the entered judgment accurately reflect the court's stated intention was proper.

III.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals has held that FCRP 60(a) provides a bankruptcy court with authority to clarify that a judgment of dismissal constitutes a dismissal without prejudice if that was the trial court's original intention at the time of making the order and if the finding of that original intent is supported by evidence in the record and is not clearly erroneous. In this matter, the court of appeals found ample evidence both in the record of the hearing at which the dismissal was announced and in subsequent statements by the trial judge to support the court's finding.

In so ruling, the Ninth Circuit has adopted the same rule as other courts of appeals with respect to the appropriate scope of FCRP 60(a). In requiring a review of the record to support a finding of the trial court's intent, the Ninth Circuit has provided practical and appropriate limitations on the use of FCRP 60(a) which are consistent with fair and efficient judicial administration. By allowing FCRP 60(a) to be used to make a judgment reflect what was undisputedly the trial judge's true intent, the Ninth Circuit has adopted a rule which preserves a balance between the policies of finality of judgments and the promotion of substantial justice.

The Ninth Circuit's opinion neither directly conflicts with the decisions of other circuits and this Court, nor is it an instance of an abuse requiring this Court's intervention to supervise the lower court or settle a new area of law. Rather, it is an example of sound judicial administration which is consistent with prior precedents.

IV.

ARGUMENT

A. The Requested Writ Should Not Issue Because None of the Special and Important Grounds for Granting a Writ of Certiorari Exist in This Case.

The petition fails to satisfy the standard governing review on certiorari set forth in Rule 17 of the Rules of the Supreme Court of the United States. That rule provides, in pertinent part, as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

For the writ to be granted in this case, the petitioner must establish that the court of appeals has rendered a decision which is clearly in conflict with the decision of another federal court on the same matter, has decided an important question of federal law which has not, but should be, settled by this Court, or has acted in a manner so far removed from the accepted and usual course as to require this Court's supervision.

Upon careful examination, the issues of federal law raised by the petition are illusory. The supposed conflicts among the circuits are reconcilable in each instance. In fact, the Ninth Circuit Court of Appeals has acted consistently with the prior decisions of the circuits.

B. The Decision of the Ninth Circuit Court of Appeals is not in Conflict with the Decisions of the Other Circuits.

The federal courts have always had the power and duty to correct judgments containing clerical errors or judgments issued due to inadvertence or mistake. *Security Mut. Cas. Co. v. Century Cas. Co.,* 621 F.2d 1062, 1065 (10th Cir. 1980) (correction unnecessary because judgment held not to bar subsequent action). This power includes the power to correct a dismissal with prejudice to one without prejudice if that was the court's original intent. *State of Maryland v. Baltimore Transit Co.,* 38 F.R.D. 340 (D. Md. 1965).

The bankruptcy court's authority to clarify its judgment is provided for by FRCP 60(a) as made applicable to the bankruptcy court by former Bankruptcy Rule 924. The circuits have uniformly held under FRCP 60(a) that the court at any time may correct errors in its judgment created by mistakes, oversights or omissions that cause the judgment to fail to reflect the court's actual intention even though such mistakes were not made by the clerk. *Jones & Guerrero Co., Inc. v. Sealift Pacific,* 650 F.2d 1072 (9th Cir. 1981); *Huey v. Teledyne,* 608 F.2d 1234 (9th Cir. 1979); *Warner v. City of Bay St. Louis,* 526 F.2d 1211, 1212 (5th Cir. 1976); *Pattiz v. Schwartz,* 386 F.2d 300 (8th Cir. 1968).

In *Huey v. Teledyne, Inc., supra,* the Ninth Circuit Court of Appeals decided the precise issue raised in this case in approving an order correcting a dismissal without prejudice to one with prejudice under FRCP 60(a). In that case, one month after entering a dismissal without prejudice for want of prosecution, the district court entered an order amending the judgment to be a dismissal *with* prejudice in order that it conform with the court's intended ruling. Finding the amended order to have been

made so that the judgment accurately reflected the earlier ruling, the court of appeals held the district court's action to be a proper exercise of its authority under FRCP 60(a). The court thus held that, under FRCP 60(a), the question of whether a judgment operates as an adjudication on the merits is subject to correction so that the court's actual intentions are correctly reflected.

In *Jones & Guerrero Co., Inc., v. Sealift Pacific, supra,* the District Court of Guam, more than one year after having dismissed a removed action for want of jurisdiction, set aside its dismissal order and ordered the case remanded to the Guam Superior Court on the grounds it had always been its intention to order the matter remanded rather than dismissed. This remand order was upheld under FRCP 60(a) by the Ninth Circuit Court of Appeals with the following statement:

> "The rule [FRCP 60(a)] may be used to make an order reflect the actual intentions of the court, plus necessary implications." *Id.,* 650 F.2d at 1074 (citations omitted).

Although the dismissal order in the *Jones & Guerrero* case was based on a lack of jurisdiction and thus was a dismissal without prejudice, the effect was to preclude further litigation due to the expiration of the applicable four-year statute of limitations contained in Section 337 of the Guam Civil Procedure Code. Thus, the court in the *Jones & Guerrero* case determined that, under FRCP 60(a), a prejudicial dismissal can be corrected to allow further prosecution of an action if that was the original intention of the court.

Similarly, in *United States v. 60.22 Acres of Land, etc.,* 638 F.2d 1176 (9th Cir. 1980), the Ninth Circuit Court of Appeals interpreted a 1938 condemnation judgment some 22 years later to effectuate the trial court's original

intention. The court examined the record of the 1938 proceeding, including the jury instructions, and interpreted the prior judgment as granting an unrestricted flowage easement, regardless of the intervening lack of use of the easement by the government. In reversing the district court, the court of appeals stated the proper rule as follows:

> "It is our responsibility to construe a judgment so as to give effect to the intention of the court, not to that of the parties." 638 F.2d at 1178.

This is not an approach which has been limited to the Ninth Circuit. The Eighth Circuit has held that FRCP 60(a) may be used to prevent a judgment from having an unintended prejudicial effect. In *Pattiz v. Schwartz, supra,* after settlement of a suit on an accelerated promissory note by a stipulated dismissal, a new suit on subsequent defaults was defended on res judicata grounds. On plaintiff's motion made almost four years after the dismissal, the court corrected the record to reflect the filing of an amended complaint which did not invoke an acceleration which had been delivered to the judge but never filed. The Eighth Circuit, per then-Circuit Judge Blackmun, approved, stating:

> "[T]he trial court possessed the power, under Rule 60(a), Fed.R.Civ.P., to enter [the] order .... *The intent of the parties and, indeed, of the trial court itself, is clear .... The district court by its order recognized only what was understood, what was intended, what was agreed, and what the court itself had accepted as the resolution of the litigation then pending.* No prejudice could possibly result from what the court did." 386 F.2d at 303 (emphasis supplied, citations omitted).

The circuit court of appeals for several other circuits have also enunciated the court's powers to interpret its judgment in plain language. *See, e.g., Kincade v. Jeffery-DeWitt Insulation Corporation,* 242 F.2d 328 (5th Cir. 1957); *Brunswick Corp. v. Chrysler Corp.,* 408 F.2d 335 (7th Cir. 1969); *E.E.O.C. v. Safeway Stores, Inc.,* 611 F.2d 795 (10th Cir. 1979).

In the present case, the Ninth Circuit Court of Appeals interpreted the scope of FRCP 60(a) consistently with its use in the other circuits. The court found that there was clear evidence in the record of the original proceeding as well as in the trial judge's explicit statements in court that his original intention was to dismiss without prejudice. Based upon this finding, the court of appeals upheld the bankruptcy court's exercise of authority under FRCP 60(a) to make the judgment entered consistent with the trial judge's intent.

Petitioner has cited the cases of *Mullins v. Nickel Plate Mining Co., Inc.,* 691 F.2d 971 (11th Cir. 1982), *Scola v. Boat Frances, R., Inc.,* 618 F.2d 153 (1st Cir. 1980), and *In re Galiardi,* 745 F.2d 335 (5th Cir. 1984) for the proposition that the Ninth Circuit has adopted an aberrant interpretation of FRCP 60(a). However, the rule of decision in these cases is not in conflict with the holding of the Ninth Circuit in this matter. In *Mullins v. Nickel Plate Mining Co., Inc., supra,* the Eleventh Circuit held it to be reversible error to use FRCP 60(a) to retroactively amend an order of partial adjudication of issues by inclusion of specific findings of finality and urgency so that it constituted a separate, final judgment pursuant to FRCP 54 after the time to appeal and run. The Eleventh Circuit cited with approval the decision in *Pattiz v. Schwartz, supra,* in defining the scope of FRCP 60(a), but found the retroactive effect of the order before it, which

eliminated the right to appeal from the judgment, to be abusive.

In the present case, there has been no retroactive effect and, as evidenced by the proceedings to date, there has been no loss of a right to appeal. Indeed, this argument, which has been raised for the first time on this petition, is totally meritless. It is beyond question that an appeal from a dismissal without prejudice by Hanil would have failed as a dismissal with prejudice, had it been intended, would have been an abuse of discretion. *Flaksa v. Little Ricer Marine Construction Co.*, 389 F.2d 885, 887-8 (5th Cir.), cert. denied, 392 U.S. 928 (1968). *See also, Judkins v. Beech Aircraft Corp.*, 723 F.2d 818, 820 (11th Cir. 1984); *Webber v. Eye Corp.*, 721 F.2d 1067, 1069 (7th Cir. 1983); *Madesky v. Campbell*, 705 F.2d 703, 704 (3d Cir. 1983); *Witt v. United States*, 681 F.2d 1144, 1149 (9th Cir. 1982); *Boazman v. Economics Lab, Inc.*, 537 F.2d 210, 212 (5th Cir. 1976); *Graves v. Kaiser Aluminum & Chemical Co.*, 528 F.2d 1360, 1361 (5th Cir. 1976); *Navarro v. Chief of Police of Des Moines, Iowa*, 523 F.2d 214, 218 (8th Cir. 1975); *Thomas v. Gerber Productions*, 703 F.2d 353, 356 (9th Cir. 1983), *Talbert v. Leighton*, 623 F.2d 585 (9th Cir. 1980).

The case of *In re Galiardi, supra,* also relied upon by Hanil to demonstrate a conflict among the circuits, is actually strikingly similar in its reasoning and holding to this case. The Fifth Circuit held that in the absence of *any* indication in the record of the court's original intent, it was error to amend an order transferring venue to another district to include the grounds for the transfer.

Similarly, in *Scola v. Boat Frances, R. Inc., supra,* also cited by petitioner, the court refused to permit a judgment to be amended to retroactively delete prejudgment interest which had erroneously been added by the clerk to the jury verdict. The court held that the addition of

interest constituted an error of law not correctable as a clerical error since an erroneous exercise of discretion was involved. As in each of the cases relied upon by petitioner, the record contained no evidence of the court's true intention.

In the present case, the Ninth Circuit has examined the record at length and found ample evidence of the trial judge's original intent. The Ninth Circuit's opinion, like the opinions of the First, Fifth and Eleventh Circuits, requires such a record and, if it exists, permits reliance upon it.

Hanil has mischaracterized the Ninth Circuit's opinion. The petitioner is dissatisfied with the inferences drawn and the findings reached regarding the trial court's intent. However, this dissatisfaction is not reason to overlook the important distinction between disagreeing over what a trial court finds from conflicting evidence and stating that the court acted without requiring any evidence. The Ninth Circuit's opinion permits FRCP 60(a) to be used to clarify a judgment to specify that it is without prejudice if, and only if, evidence of that intent is found in the record and the court's finding as to the trial court's original intention is not clearly erroneous. This is consistent with the decisions in all of the other circuits and does not conflict with any opinion of this Court.

C. The Ninth Circuit's Opinion Does Not Circumvent Rule 41(b).

Hanil seeks an order directly contrary to the bankruptcy court's expressed intention as to the nature and quality of the dismissal. To support this position, Hanil argues that Rule 41(b) requires that a dismissal for "failure of prosecution," in all events and in all circumstances, with no further inquiry, constitutes a permanent

bar to further litigation unless the magic phrase "without prejudice" is expressly included in the written judgment.

However, the Federal Rules are not as inflexible as Hanil argues. "Rule 41(b) clearly places dismissal for failure to prosecute in the district court's discretion." 5 *Moore's Federal Practice* § 41.11[2] (2d ed. 1984). That discretion judicially tempers the bare language of Rule 41(b). Annot., 5 ALR Fed. 897, 899.

In *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265 (2d Cir. 1974), two successive trademark suits were each dismissed for lack of prosecution over a nine-year period. On appeal from the judgment for defendant in a third action, the appellate court, noting that the dismissal of the first suit included no qualifications or specifications, nevertheless refused to apply Rule 41(b) to preclude relitigation. The court held that the trial judge's belief that the first case had been dismissed without prejudice as well as the continuing nature of trademark infringement would override the presumption of FRCP 41(b).

As in *La Societe Anonyme, supra*, it was proper for the bankruptcy court to review the entire record in clarifying the judgment because:

> "[F]acts suggest there may be evidence outside the face of the order plainly indicating the dismissal to be without prejudice, [and] the [trial] court should explore this question. . . " 495 F.2d at 1275.

The citations (or, more precisely, miscitations) in the Judgment of Dismissal to the local rules are a further indication of the nonprejudicial nature of the dismissal. This was the case in *United States v. Thompson*, 114 F. Supp. 874 (S.D.N.Y. 1953). A suit by the United States on a bond was twice dismissed without prejudice for lack of prosecution and then reinstated upon a showing of

good cause under a local court rule. The case was dismissed a third time and not reinstated. Upon the filing of a new action, the court rejected the argument that the third dismissal was with prejudice by reason of Rule 41(b) because reference to the local rules was an "other specification" taking the judgment outside Rule 41(b). The court held Rule 41(b) should not be read to cancel the terms of a local rule even though the local rule did not specify that such dismissals were without prejudice. *Accord, Zaroff v. Holmes*, 379 F.2d 875, 877 (D.C. Cir. 1967) (Rule 41(b) is not dispositive of the construction to be placed upon local rules governing pretrial proceedings and diligent prosecution, regardless of the fact such rules do not address the prejudicial nature of the dismissal).

Although the then-applicable local rules of the United States District Court for the Central District of California and the United States Bankruptcy Court for the Central District of California did not specify whether dismissals pursuant to them were prejudicial or not, the current version of Local Rule 12.4 specifically provides that a dismissal for want of prosecution is without prejudice unless otherwise stated. This may be indicative of their proper construction. At any event, the local rules at issue in this case are similar to those discussed in *Thompson* and *Zaroff*, which resulted in nonprejudicial dismissals. Inasmuch as this effects a result directly opposite to Hanil's reading of Rule 41(b), it is apparent that Hanil is incorrect when it argues that Rule 41(b) is a rule of substantive law which local court rules cannot qualify or modify. The dismissal as entered in this case was, as intended, a dismissal without prejudice. Therefore, the Order Clarifying was proper and the Ninth Circuit Court of Appeals' opinion reinstating that order was appropriate.

V

CONCLUSION

Petitioners have failed to establish that the court of appeals has decided an important issue of federal law in a manner which is clearly in conflict with applicable decisions of this Court. Neither have they established that the court of appeals has rendered a decision which is clearly in conflict with the decision of another federal court of appeals on exactly the same matter or that there has been any deviation from established authority. To the contrary, the Ninth Circuit has reached a holding which allows FRCP 60(a) to be used to make a judgment express the true intention of the court if that intention is determinable by reference to the record. This standard provides appropriate guidelines for the use of FRCP 60(a). Based upon the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: March 19, 1987

Respectfully submitted,

DANNING, GILL, GOULD, DIAMOND & SPECTOR

CURTIS B. DANNING*
RICHARD K. DIAMOND

By_____

CURTIS B. DANNING
Counsel for Respondent
Carlyle Michelman, Trustee

* *Counsel of Record*

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 19, 1987, I served the within Opposition of Respondent Carlyle Michelman, trustee, to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, October Term, 1986;

on the Petitioner in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Lillick, McHose & Charles
M. David Minnick
725 South Figueroa Street
Suite 1200
Los Angeles, CA 90017

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 19, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
APR 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1378

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HANIL BANK,
Petitioner,

VS.

CARLYLE MICHELMAN, TRUSTEE,
Respondent.

REPLY OF HANIL BANK TO OPPOSITION OF CARLYLE MICHELMAN, TRUSTEE TO HANIL BANK'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

LILLICK MCHOSE & CHARLES
M. DAVID MINNICK
725 South Figueroa Street
Suite 1200
Los Angeles, CA 90017
(213) 488-7100
Counsel for Petitioner,
Hanil Bank

Bowne of Los Angeles, Inc., Law Printers (213) BOWNE CO

15PP

TABLE OF CONTENTS

	Page
A. STATEMENT OF THE CASE	1
B. ARGUMENT	5
C. CONCLUSION	10

TABLE OF AUTHORITIES CITED

Cases

	Page
Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974) cert. den. (1974)	6
La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265 (2nd Cir. 1974)	8
Mullins v. Nickel Plating Mining Co., Inc., 691 F.2d 971 (11th Cir. 1982)	6
North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)	6
Pattiz v. Schwartz, 386 F.2d 300 (8th Cir. 1968)	7
United States v. 60.22 Acres of Land, etc., 638 F.2d 1176 (9th Cir. 1980)	6, 7
United States v. Thompson, 114 F.Supp. 874 (S.D.N.Y. 1953)	9
Zaroff v. Holmes, 379 F.2d 875 (D.C. Cir. 1967)	9

Rules

Federal Rules of Civil Procedure, Rule 41(b) 7, 8, 9

Federal Rules of Civil Procedure, Rule 60(a) 5, 6, 7, 8, 10

Federal Rules of Civil Procedure, Rule 60(b) 5

Statute

United States Code, Title 28, Sec. 1291 6

Textbook

15 Wright, C., A. Miller & E. Cooper, Federal Practice and Procedure, Sec. 3901, pp. 398, 399 (1976) 6

No. 86-1378

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HANIL BANK,
Petitioner,

VS.

CARLYLE MICHELMAN, TRUSTEE,
Respondent.

REPLY OF HANIL BANK TO OPPOSITION OF CARLYLE MICHELMAN, TRUSTEE TO HANIL BANK'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

A. STATEMENT OF THE CASE.

1. The opposition of the respondent Carlyle Michelman, Trustee, ("Michelman") to Hanil's petition for writ of certiorari ("Opposition") contains several allegations which could give this Court a misimpression of what the Ninth Circuit has done in this matter. In one instance, Michelman seeks to minimize his failure to appear at trial by claiming that the bankruptcy court's normal practice was to use the trial date as a mere status conference. Opposition, p. 3, lines 9-14 and p. 6, lines 13-16. There is no evidence in the record to support such a statement. In fact, when Michelman's counsel made that assertion to Judge Ordin at the first hearing on

Michelman's motion to clarify that the judgment of dismissal was without prejudice or to vacate the judgment ("Motion to Clarify"), Judge Ordin objected saying, "Wait a minute. We try almost everything the first time around." E.R.[1] 661. Judge Ordin moved his cases to trial promptly and Michelman was well aware of that fact. E.R. 94.

2. Michelman would also have this Court believe that Judge Ordin always intended the judgment of dismissal to be without prejudice and so ruled. Opposition, p. 8, lines 11-15. This Court can get a much better understanding of Judge Ordin's view of his original judgment of dismissal from the following exchange which occurred on January 6, 1983 at the first hearing on Michelman's Motion to Clarify:

> "THE COURT: What really is the issue? Why didn't you come in here immediately and say, wait, it's been an error, we did some things, we want to be relieved; let's go from here; there's been no real delay; move on; here we go. Different ballgame; isn't it?
>
> MR. WEINSTEIN: The answer to that, your Honor, is that our understanding was, and I think the judgment says, that the dismissal was one without prejudice. So, there was no real reason to have this motion until the question was raised, and all of a sudden we found out.
>
> THE COURT: Wait a minute. I don't remember the judgment said without prejudice.
>
> MR. WEINSTEIN: No, it didn't. It does not have that language.

---

[1]"E.R." refers to the excerpt of record filed in the court of appeals.

THE COURT: It sure didn't. *It said dismissed. When an adversary is dismissed in trial context that presumption is it is with prejudice.* That's what the cases seem to say; don't they, Mr. Minnick?

MR. MINNICK: Yes, your Honor.

THE COURT: *That's the way I understood the law.*

• • •

THE COURT: But it was also one you must be charged with the knowledge of from the time the dismissal was entered. It took you ten months to say, hey, maybe it was with prejudice. I don't understand that. The trustee's attitude is impossible to understand. This was the same trustee that didn't contest the vacating of the stay one day when he was in open court with an opportunity to do so." (emphasis added) E.R. 655-656.

These and numerous other statements by Judge Ordin help explain why Judge Ordin could never bring himself to sign an order stating that he had always intended to make the dismissal without prejudice. They also explain why United States District Judge Stotler ruled that it was clearly erroneous for Bankruptcy Judge Ayer to determine that Judge Ordin had originally intended the judgment of dismissal to be without prejudice.

3. Michelman summarily states that Hanil has not been prejudiced by the belated change in the judgment of dismissal. By denigrating the damage to Hanil, Michelman hopes this Court will reject review of this case and thus never see the record which establishes the prejudice to Hanil beyond question.

Judge Ordin did not buy Michelman's claims that Hanil had not been prejudiced. At the January 6, 1983 hearing

Judge Ordin stated his concerns about Hanil's business decisions in reliance on the judgment and the problems of preparing for stale litigation:

> "THE COURT: Mr. Weinstein, you think you could fairly say that if your client had taken steps during the first ten days of March to set aside the complaint — that dismissal, that Hanil Bank would have proceeded in the same fashion to make the same commitments, the same financial expenditures as it did when your client did not take any steps to correct —
>
> MR. WEINSTEIN: Your Honor, —
>
> THE COURT: Are you in a position to make that representation as a fair minded lawyer?" ER. 659-660.
>
> • • •
>
> "THE COURT: Well, they got a dismissal of the cross complaint. That was the end of it. And now they went ahead and arranged their affairs in whatever way they felt would be in the best interest of the bank. All right.
>
> (Off the record.)
>
> THE COURT: Had there been a motion attacking it filed within a reasonable period, three or four weeks, perhaps, don't you think that the bank and its counsel would have addressed themselves to meeting the challenge and gathering the evidence and putting their statements together and interviewing their witnesses, and doing things which they now have not done for 10½ months. Don't you think that is a fair result of your waiving and delay?
>
> MR. WEINSTEIN: Your Honor, they have not done it quite presumably. But they also have not been

under any requirement to do it until available to them.

THE COURT: Are you able to tell me that 10½ months later you can do the same kind of preparation to meet the challenge that you can when everything is fresh at the time the matter is first called?

MR. WEINSTEIN: I suppose if we assume that certain memories have been clouded or perhaps some given individual have (sic) left town or died.

THE COURT: Or that transactions have occupied the time or attention of the witnesses of things that were fresh in their minds when they thought they were going to testify then were now clouded or forgotten about, other matters have occurred. Don't you think there's really a fact, or that as a trial lawyer I can't believe you cannot give some credance to their problem." E.R. 662-663.

Judge Ordin was acutely aware of the prejudice to Hanil. Since prejudice is a key element in determining the availability of relief under Rule 60(b), Judge Ordin never could justify that remedy. Neither could the District Court. The Ninth Circuit simply chose to ignore the issue entirely.

B. ARGUMENT.

1. Michelman's statement of the proper use of Rule 60(a) in the Ninth Circuit graphically displays the need for this Court to rectify the situation. Michelman argues that the Ninth Circuit permits Rule 60(a) to authorize a change in a judgment if evidence in the record will support the change. Opposition p. 16, lines 6-11. There is no restriction on the type of change which can be made nor is there any limit on when it may be made.

Contrary to Michelman's allegations, the First, Fifth and Eleventh Circuits do not permit such a result even if there is evidence in the record to support it. In *Mullins v. Nickel Plating Mining Co., Inc.,* 691 F.2d 971 (11th Cir. 1982), the Eleventh Circuit noted that the trial court had expressly stated in its earlier judgment that execution could issue even though it was a partial summary judgment. 691 F.2d at 973. In spite of that clear evidence in the record of the trial court's intent, the court of appeals rejected the trial court's effort to use Rule 60(a) to correct the judgment so that it could formally be enforced. The relief could not be permitted because it affected substantial rights of the parties. *Id.*

2. The Ninth Circuit's position offers no solution for having erased Hanil's right to appeal. Michelman boldly states that Hanil has not lost its right to appeal because Michelman believes Hanil would have lost the appeal any way. Opposition, p. 15, lines 3-10. Hanil may appeal as a matter of right. 28 U.S.C. § 1291. 15 Wright, C., A. Miller & E. Cooper, Federal Practice and Procedure, Section 3901, p. 398 (1976). The courts have carefully protected against judicial attempts to coerce a party not to appeal. *North Carolina v. Pearce,* 395 U.S. 711, 724, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Clark v. Universal Builders, Inc.,* 501 F.2d 324, 341-342 (7th Cir. 1974) cert. den. (1974); 15 Wright, C., A. Miller & E. Cooper, Federal Practice and Procedure, Section 3901, p. 399 (1976). In this case the court did not coerce Hanil not to appeal, the court removed any opportunity for Hanil to appeal.

3. There is so little support for the Ninth Circuit's use of Rule 60(a) to justify the relief granted in this case that Michelman seeks to offer different theories to support the Ninth Circuit's action. For example, Michelman refers to the power of a court to interpret its judgments. Michelman's citation of *United States v. 60.22 Acres of*

Land, etc., 638 F.2d 1176 (9th Cir. 1980), makes no reference to Rule 60(a). It is merely a case where the court sought to interpret an earlier condemnation judgment when deciding whether to permit evidence to be presented on certain issues during the course of trial. The effect of the earlier judgment was clear from its face and the court ruled accordingly. The other cases cited by Michelman are similarly inapplicable where, as here, the effect of the judgment of dismissal is unambiguous.

The Ninth Circuit was not faced with interpreting the effect of the original judgment of dismissal. Even the Ninth Circuit readily admitted that the judgment of dismissal was with prejudice as is required by Rule 41(b). The only issue is whether the Ninth Circuit can authorize a change in the effect of that judgment of dismissal through the use of Rule 60(a).

4. Michelman's Opposition dramatizes one of the crucial defects in the Ninth Circuit's use of Rule 60(a). The Ninth Circuit never deals with the prejudice to parties resulting from the changing of judgments at any time under Rule 60(a). The case of *Pattiz v. Schwartz*, 386 F.2d 300 (8th Cir. 1968) cited by Michelman for the use of Rule 60(a) expressly stated that: "No prejudice could possibly result from what the court did." 386 F.2d at 303.

Michelman hopes that this Court will not focus on the prejudice to Hanil from the Ninth Circuit's ruling. The record below is replete with evidence of Hanil's change of its position in reliance upon the judgment of dismissal. However, Michelman would have the Court believe that prior to the judgment of dismissal Hanil obtained regulatory approvals to do everything it did after entry of the judgment of dismissal. Such is not the case.

Hanil did take steps to obtain approval from the California State Banking Department to bid on the pledged

stock of the First State Bank of Southern California ("FSB") at the foreclosure sale. E.R. 138. Such approval was necessary if Hanil wanted to credit bid at the sale (E.R. 331-322) to protect the value of the FSB shares and reduce Hanil's loan loss. E.R. 502. If Hanil acquired the FSB stock at the foreclosure sale, Hanil would have at least two years to hold the FSB stock before deciding whether to operate FSB or sell the FSB stock. E.R. 322. If Hanil elected to operate FSB, Hanil would need to obtain the approval of the Federal Reserve Board of Governors to become a bank holding company. *Id.* Hanil did not seek Federal Reserve Board approval until several months after the judgment of dismissal when Hanil believed the judgment of dismissal had terminated Michelman's claims to the FSB stock. E.R. 502-505.

If Hanil's change of position is not enough prejudice, Judge Ordin accurately identified the prejudice to a party trying to prepare a lawsuit months and now years after the events in question. All of this could have been avoided if Michelman truly wanted to pursue his claim. All Michelman had to do was challenge the effect of the judgment of dismissal promptly with the trial court or on appeal.

5. Michelman seeks to minimize the effect of the Ninth Circuit's use of Rule 60(a) to completely abrogate the purpose of Rule 41(b). Not even the Ninth Circuit could avoid admitting that Rule 41(b) made the judgment of dismissal with prejudice. Nevertheless, Michelman offers an unsupportable view of Rule 41(b) to avoid its application in this case.

Michelman argues that the case of *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265 (2nd Cir. 1974), permits a search of the entire record to see if Rule 41(b) requires a dismissal with prejudice.

While the Second Circuit remanded the matter for further investigation of the effect of the dismissal, the Second Circuit expressly directed the trial court to look at two sources. 495 F.2d at 1275 n. 12. One source was any local rule in effect at the time of the entry of the judgment of dismissal which might have stated that the judgment should be without prejudice. The other source was a prior order expressly referenced in the dismissal order and which set out the conditions of the dismissal. In either event, the parties would have an express statement of the court's intent of which they should be on notice. Neither approach suggests the parties are to comb through transcripts in order to divine what may have been intended. Rule 41(b) was adopted to avoid just such uncertainty.

No one would dispute that a local rule may provide that any judgment of dismissal is without prejudice unless otherwise stated. Such a local rule is merely an express statement by the court that a dismissal is to be without prejudice. Rule 41(b) recognizes and approves such express statements.

The case of *United States v. Thompson,* 114 F.Supp. 874 (S.D.N.Y. 1953) is no different. The local rules provided that a dismissal was without prejudice. As a result, the local rule prevented Rule 41(b) from making the dismissal with prejudice. *Zaroff v. Holmes,* 379 F.2d 875, 877 (D.C. Cir. 1967) also deals with the interpretation of local rules in determining the prejudicial effect of a dismissal.

None of this is relevant here. Even Michelman admits that the applicable local rules at the time of the judgment of dismissal did not state that such a dismissal should be without prejudice. Lacking any express statement that the dismissal is without prejudice, the United States District Court and the Ninth Circuit both agreed that the judgment of dismissal was with prejudice under Rule 41(b).

C. CONCLUSION.

This Court has yet to give guidance on the proper use of Rule 60(a). Litigants and the courts need to know the standards for granting Rule 60(a) relief so as to maintain the integrity and reliability of federal court orders.

DATED: April 1, 1987.

Respectfully submitted,

M. DAVID MINNICK
LILLICK MCHOSE & CHARLES
725 South Figueroa Street
Suite 1200
Los Angeles, CA 90017-2513
(213) 488-7100
Counsel for Petitioner
Hanil Bank

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On April 1, 1987, I served the within Reply Brief in re: "Hanil Bank vs. Carlyle Michelman" in the United States Supreme Court, October Term 1986, No. 86-1378;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows;

Curtis B. Danning
Richard K. Diamond
Danning, Gill, Gould, Joseph & Diamond
1800 Century Park East
Los Angeles, California 90067
Attorney for Respondent

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 1, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA